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THE COUNTY COURTS OF ENGLAND.

A COURT, without lawyers, and without a jury, is a novelty, if not an anomaly. Such, practically, is an English County Court.

By the invitation of Mr. Adolphus, known to the profession as a learned reporter and leading barrister, and now a County Court Judge, I attended a session of his court, in the Mary-le-bone District of London. The court-house is a large building, with its name printed on a large sign over the door, and easily found by the poorer class of suitors who may seek for it. The lower story is occupied by the offices of the registrar and of bailiffs, and the upper by the court room. It was about noon, the court room was well filled with parties and witnesses, the judge sat upon the bench, in a barrister's wig and gown, the registrar sat below him, as does the clerk of our courts, and there was a reasonable attendance of bailiffs and other officers.

The course of proceedings may be best presented to the reader by a familiar description.

The registrar calls a case. John Lucas against William Brown. "John Lucas, John Lucas, is John Lucas in court!" calls the bailiff. John Lucas appears, and takes his stand in the witness box, on the left of the judge, and is sworn. Mr. Brown is called in the same manner, and

takes his place at the opposite box. They are in full sight of each other, separated by the registrar's desk. There are no written pleadings, but only the names and descriptions of the parties, and the plaintiff's bill, made out like a shop bill, and sworn to. The judge reads over the bill to the plaintiff and examines him upon it, and requires him to tell his story, when and how the contract was made, the goods delivered, and why the bill was not paid. He then asks the defendant if he wishes to examine the plaintiff. Mr. Brown is quite ready to do so, and a series of questions is put and replied to, which developes the real issue quite as well as the best special pleading. Perhaps the very first question by the defendant shows that he has no defence, except as to the mode of payment; or else, that the dispute turns on the value or condition of some of the articles.

"Mr. Lucas, didn't my wife tell you that the pitcher was broken, and that the plates were not worth more than two shillings?"

"Then you admit," says the judge, "that you received all these articles, Mr. Brown?"

"I don't deny that, your honor."

"Have you got them now?"

"Yes, sir."

The judge then intervenes as a day's-man between them, and after a little talk between the parties and the judge, and perhaps an examination of Mrs. Brown, as to the condition of the pitcher and plates, the plaintiff deducts a little from his bill, and takes a judgment by instalments, at £1 10*s.* per month.

The next case is not contested. The defendant has been duly summoned, but does not appear. Still, judgment is not given by default, but the careful and conscientious judge examines the plaintiff under oath, and if need be, his witnesses, and gives judgment *in foro conscientiæ*, perhaps, too, by instalments, unless the plaintiff shows that the defendant is well able to pay at once, or is open to a suspicion of absconding, or of concealing property.

Several intermediate cases are rapidly disposed of, there being no defence, or a defence easily yielded to, or easily broken down by a few inquiries; and then comes one of more difficulty, whether certain services were gratuitous or for pay. Both parties and their wives are examined, indeed all of both households. Here again the earnest and unskilful testimony of the wives, and the untutored

questions put by the parties on cross-examination, let much light into the case, and the judge is able to arrive at a satisfactory conclusion. Indeed, with a little watch against irrelevance, the case seems to try itself. The next is a tort, and here it is soon plain enough that an assault was committed, but after a provocation offered, and that it is only a question of damages. .

In another case, the defendant owns that he ought to pay the debt, and complains that the plaintiff, being a rich man, has pressed him. This statement, the rich man, who is a grocer at the street corner, denies, and to show his truth, offers a large extension of payment by instalments without interest, which the judge advises the defendant to be satisfied with; and judgment is entered accordingly, and both parties go away better satisfied than they came.

Then comes the case of a man who has obtained a judgment some time before, which the defendant does not pay, and a sort of chancery examination is made into the state of the defendant's affairs, on a charge that he has secreted property.

After this fashion, in a session of six hours, from ten o'clock in the morning until four in the afternoon, the learned judged dispatched a trial list which I am quite sure one of our courts, aided by two counsel on each side, and by twelve citizens called from their business on purpose, would have needed as many days to dispose off.

There was but one lawyer in attendance, and he appeared only in two causes, and rather shabbily in those. In one, he cross-examined the plaintiff and his witnesses severely, and when called upon for the defence, had none to offer. His only hope was to break down the plaintiff's case. In the other, he attempted a defence by calling witnesses to some indirect matter; but the judge told him that if he did not call the defendant and his wife, who knew all about the main facts, he would not trouble him to go into an indirect defence. In each case, I am quite sure there would have been no defence but for the attorney, and the only effect of his intervention was that his clients had his services to pay for, and a larger bill of costs adjudged against them.

If the amount at stake exceeds £5, either party may require a jury as matter of right; and the judge may in any case, at his discretion, order a jury, on motion of either party; yet, in no case on the entire docket for this

term, was a jury demanded; and I was told that it is very rarely that one is called, although the jurisdiction of the court extends to £50, which, on a comparison of the condition of the humbler classes in the two countries, is worth more than $250 in America. It would not be just to say that this results solely from greater confidence in a judge's decision. The delay, increased costs, and the expense of counsel which a jury renders almost necessary, also contribute to the result.

I could not but be struck with the evident and decisive advantage of admitting, which ususally amounts to requiring, the testimony of parties. It prevents many suits being brought at all, prevents many defences being attempted, and shortens trials. When this system was introduced, making a revolution in the common law, it was opposed by many of the judges of the superior courts. The last Parliamentary examination showed that twelve of the fifteen judges of the Westminster Courts were satisfied of its advantage, and now, I believe, all doubts are removed. One of the most eminent of these judges told me, at the Cambridge assizes, that he had been the last, or one of the last, to give in to the change; but that the balance of the advantages, as developed by several years experience, was so decidedly in its favor, that nothing would justify a return to the excluding either of parties or interested persons. Mr. Adolphus told me that the practice of admitting wives to testify in their husband's cases was almost essential in a large portion of small contract causes in cities, in which such affairs are often managed by the women solely. Even under the stricter rule of the old law, married women could trade in their own right by the custom of London. He said that the wives were usually biased witnesses, but that beside being often necessary witnesses, their earnest and unskilful testimony usually brought out the truth. One would hesitate long before breaking down entirely the rule of public policy and humanity which secures to the relation of husband and wife the reposal of absolute confidence, even in cases of misconduct. This is often of more importance to society than is the full development of testimony. Nor is it a small matter that the wife is protected against the means a husband may employ to secure or prevent or qualify her testimony, and that he is saved from the temptation. But it cannot be doubted, that in merely civil causes not of momentous interest to the parties, the admission of this testimony works well.

Leaving the court room, I passed into the registrar's office. This presents a scene something between a large collecting attorney's office, and a savings bank, as the court room reminds one of a Probate Court. The course of proceedings is the best explanation of the system.

When a person has a demand for which he wishes the aid of the court, he goes to the registrar's office and presents his bill. The names of the parties and their residences, with a brief memorandum of the case, is entered in the books, after the manner of an attorney's collecting-book. The plaintiff makes an affidavit to his demand, pays a small fee, and goes his way. The registrar files the bill, issues a summons to the defendant, and the bailiff serves it. Payments must be made into the registrar's office. If the defendant pays the debt, or any part of it, it is credited to the plaintiff, and notice is sent to him. If he declines the tender, or if the defendant makes no tender, and the plaintiff choses to proceed, the case is put on the trial list for a certain day, and the parties notified to be present with their witnesses. When a judgment is rendered, it is entered in these books, and the costs taxed. Each payment made by the defendant, where judgment is by instalments, is duly credited. These small accounts require a good many assistants to the registrar, and the books and business of paying and receiving, remind one of our savings banks. If the defendant fails to pay any instalment, execution may issue for the whole debt; but the registrar of this court, who was a barrister, and a man of character and intelligence, told me that the plaintiffs seldom required it, and found it usually for their interest to extend the time. In the arrangements between parties at this office, the registrar often exercises an advisory jurisdiction.

This system discloses the secret of the non-appearance of attorneys. The provisions requiring the registrar to receive and file the demands in the first instance, and to issue the summons, without formal written pleadings, and requiring that all monies shall be paid to him, whether voluntary payments or on execution, leave nothing for the attorney to do. If not so intended, it yet has had the effect of keeping down a class of practitioners that these courts of large business in small amounts would inevitably have generated. There is nothing to prevent the employment of counsellors, either in advising as to the commencement or prosecution of a claim, or in conducting the trial

and arguing the cause to the court, but attorneys, as such, are not needed; and even counsellors, where there is no jury, no pleadings, small amounts at stake, and an intelligent jurist on the bench, are hardly worth their charges, except in a few peculiar cases. And the judge, somewhat like our Judges of Probate, is expected to be the adviser of both parties.

These County Courts, which are of recent legislative creation, and must not be confounded with the Sheriff's Courts of the old law, were established in the year 1846, by the act of 9 & 10 Victoria, with a jurisdiction to the extent of £20. Being found to work very well, this jurisdiction was raised to £50, and extended over a larger class of causes, by the act of 13 & 14 Victoria. There is a still further enlargement of their jurisdiction over classes of causes, though not of the limit of pecuniary value, in the act of this year.

As the courts now stand, their chief characteristics are the following:—

Their general jurisdiction extends over all "personal actions," when the "debt, damage or demand, does not exceed the sum of £50, whether on balance of account or otherwise." From this general jurisdiction, have heretofore been excluded causes in which the title to land, or to "any corporeal or incorporeal hereditaments, or toll, fair, market or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation, under a will or settlement, may be disputed; or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage." But by the act of this year, the County Courts may try any causes, except for criminal conversation, which may be brought in any Superior Court of Common Law, upon a written agreement to that effect being signed by both parties or their attorneys, and filed in court. And if the title to land, or to any corporeal or incorporeal hereditaments, toll, fair or franchise, comes incidentally in question, the judge may decide the question upon the written consent of parties, but such decision, incidentally given, is not evidence of title in another suit. A man cannot split up a large demand so as to bring it within £50, but the court has jurisdiction if the plaintiff waives the excess over £50 in his original bill; or if a demand originally exceeding that limit, is reduced to £50 or less by credits, or by an off-set admitted by the defendant.

In any case exceeding £20, if upon contract, or £5 if for tort, the defendant may, before trial, remove the case to a Superior Court, upon giving security. The judge may change the venue to any other County Court, for good cause shown; and any Superior Court may order a case pending before it to be tried in a County Court, on the application of either party, if the demand did not originally exceed £50, or if it be reduced to that sum by tender, admitted off-set, or otherwise.

The jurisdiction of the County Courts is not exclusive of the Superior Courts, but suits in the Superior Courts for causes within the jurisdiction of the County Courts are discouraged by penal provisions as to costs, except in cases where the plaintiff lives more than twenty miles from the defendant, or where the cause of action arose out of the county in which the defendant lives, or where an officer of the County Court is a party, and other similar cases in which a special certificate is granted.

The jurisdiction of the County Courts extends to some cases not of common law cognizance in England, as cases of demands not exceeding £50 respecting the whole or part of an unliquidated balance of a partnership account, a distributive share of the personal estate of a person deceased intestate, or for a legacy under a will, and in suits of interpleader. They have also jurisdiction for summary relief where houses, lands, or other corporeal hereditaments are unlawfully witheld by a tenant from his landlord.

In all cases of a debt, or liquidated money demand, exceeding £20, the defendant must give written notice in court of his intention to defend, before the return day. If he fails of this, he is liable to be defaulted, with costs. In all other cases, the plaintiff must come to court prepared to prove his claim, if he hears nothing from the defendant after summons. All judgments may be for payment by instalments, at the discretion of the judge.

The annual returns of the County Courts to Parliament, show the following table of causes entered, (which includes all in which a summons is issued,) in all the County Courts of the Kingdom since their establishment: —

1847	429,215
1848	427,611
1849	395,191
1850	396,793
1851	441,584

1852	474,149
1853	484,966
1854	526,718
1855	538,168

Of these, the numbers, which have been entered for trial, and in which judgments have been rendered, either by default, on *ex parte* hearing, or after trial, are as follows: —

1847	267,446
1848	259,118
1849	226,403
1850	217,173
1851	233,646
1852	246,133
1853	254,734
1854	282,224
1855	285,171

In each year the number settled, either by payment, compromise, or withdrawal, after summons, and before the opening of the court for trial, seems to have been somewhat less than one half. In each of these eight years, the gross amounts for which judgment has been decreed in court has been between £816,000 and £629,000, without any material variation, or regular increase or diminution.

The salaries of the judges are liberal, and are arranged in classes according to the business of the courts, as shown by the returns; and the judges and assistants must be barristers of a certain rank and a certain number of years' practice. Although the title is preserved, some of the larger counties are subdivided into districts, each having its court, and for the convenience of suitors, the courts make circuits through the regions of their jurisdiction, holding courts at the large towns, at times previously announced in the newspapers.

Such are the English County Courts, which have, directly and indirectly, wrought so great changes in the judicial system of all England. At least, it may be said that there is much in them worthy the attention of the American legislator and jurist.

D.

POLITICAL SCIENCES IN AMERICA.

A GERMAN VIEW.

GESCHICTE UND LITERATUR DER STAATSWISSÈNSCHAFTEN. VON ROBERT VON MOHL. In 3 Bande. Roy. 8vo. Erlangen. 1855.

History and Literature of the Political Sciences. By Robt. von Mohl. 3 *vols.* 8*vo.* 1*st volume, pp.* 599. *Erlangen.* 1855.

THE author of this work enjoys and merits the reputation of being one of the most eminent publicists of Germany. In the year 1848, he was called from the chair of public law, at the University of Heidelberg, to fill the great post of Minister of Justice to the German Empire, which he continued to hold until the dissolution of the Central Government in 1849. He was thought upon retiring from that office to be one of the few of the learned class, who, in those troubled times, added to their previous reputation, that of an aptitude for public business. Since the failure of that great endeavor to revive the civic glories of Germany, Prof. von Mohl has devoted himself to the duties of his distinguished academic position, and to enriching, by his contributions, the legal literature of his country.

The first volume of his most important work, — embracing the revised and collected results of many previous labors, — appeared during the past year, and is to be speedily followed by the two remaining volumes. Apart from its intrinsic value, this production claims attention as the first that has any pretension to be a complete treatment of so extended and interesting a subject. Mr. Blakie, of Glasgow, has recently published two volumes of very considerable merit in the same department, but neither in kind nor degree calculated to supersede the work of Von Mohl, which will no doubt continue for a long time to come to be the standard authority and guide-book in the literature of public law.

The table of contents is one to gladden the heart of every man who is interested in the study of the chief problems of organized society, — presenting as it does at once an historical review and critical appreciation of every work of note that has appeared upon these subjects. The general introduction is followed by an admirable discrimination between the science of government and legislation,

and the modern so-called social sciences. Then are passed in review the works containing general systems, and encyclopædias; the political romances from Plato's Republic to Cabet's Icarie; the classical, mediæval and modern theories of the State, (under the American head, Paine, Adams, Livingston, the Federalist, and De Tocqueville,) Political Economy, its history and literature; the Swiss Confederation; the American Union and the several States.

The next volume comprises the history and literature of the English Constitution; memoirs, writings and speeches of the English Statesmen of the eighteenth and nineteenth centuries; German public law since the dissolution of the Empire, with notices of the principal publicists; French public law.

The third volume will contain the general literature of governmental and administrative policy. Monographs on the Machiavellian literature, and upon Jeremy Bentham and his influence upon legislation, beside other matter not yet announced.

Some idea of the particularity and extent of the author's treatment of his topics, may be formed from the subjoined translation of the section upon Constitutional Conventions in the United States. As it has a special interest for American readers, we do not apologize for its length:

"The proceedings of the Constitutional Conventions of the several States are of the highest importance, not only to a knowledge of their existing governments, but as contributions to the science of public law. It must always be a spectacle of extreme interest to witness the formation of an entirely new political community, through the voluntary act of its members, discussing systematically and in detail a proposed constitution. These American Conventions, whose decisions are afterwards submitted to the popular vote, furnish a practical refutation of the assertion of many writers, (Haller and others,) that a State has never yet been founded by the act of its members as parties to a contract, and that theory is the mere fiction of a false philosophy. Foolish as it certainly is to assume such an origin in States, whose history contradicts it, and thoroughly absurd as are such attempts as that for instance of Acherly, to found the British Constitution upon a series of contracts concluded in some primitive parliament under the auspices of one Britannus, yet it is no less clear, that such has in fact been the origin of States in America.

The significance of the fact in political science is not diminished by the circumstance that the States thus coming into existence become members of a general confederacy, whose constitution is already fixed, or that they are restricted to the republican form. The problem is simply, whether it be practicable to lay the foundation of a new State in the mutual agreement of individuals, and this problem is clearly solved.[1]

"The Constitutional Conventions of the last few years are particularly instructive as exhibitions of the logical development of the democratic principle. The value of the discussions varies of course very materially, according as the Convention is called for the amendment of the constitution in one of the older and more cultivated States, and composed of its ablest and best educated men; or whether it is for the institution of a new State by representatives of the dubious civilization of the backwoods. In the former are to be recognized accomplished statesmen and orators, and many of their debates are admirable accessions to the science of politics. In the latter little is to be found but a certain plain native sense, with occasionally a tincture of culture from the older States.

"The following remarks will give an idea of the extremes of political culture in the United States. The proceedings for organizing the State of California, exemplify the views and influences which prevail in the earliest stage of a democratic community, while in the Massachusetts Convention, we are led to the highest point of development of modern popular policy.

"California did not pass through the transition phase of territorial government; after its acquisition it was held as a military possession; when, however, in consequence of the discovery of gold, a crowd of adventurers from all parts of the world poured in, the population swelled suddenly to such an amount as to render the formation of a State legal under the requirements of the Federal Government, and in a high degree necessary. In accordance with a requisition issued by the military commander, the

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[1] It seems proper to state in this connection that in that part of his work specially treating of the subject, the author in common with the abler recent writers, dissents from the once popular theory of the Social Compact. It is not a topic to be disposed of in a note, but the reader who has given much attention to such matters will not confound what is said in the text with the doctrine of the Rousseau school.

inhabitants chose delegates to prepare a Constitution for adoption by the vote of the whole people. The composition of the assembly corresponded to the peculiar character of the population. It consisted in part of a number of cunning lawyers, covetous of honors and of gold, and whose morality seems liable to something more than suspicion, partly of rough and ignorant subjects drawn from all possible social conditions; add to these a few Mexicans of Spanish descent, manifestly the honorable men of the body, but laboring under the two-fold disadvantage of a foreign language and recent conquest. The Convention met at Monterey, a miserable settlement, in which there was not even a printing-press to be found. One thing they were bent upon, to get through their work in the shortest possible time, and hurry back to more lucrative employment. As to fundamental principles they were sufficiently agreed; democracy was to have free development, and the newest constitutions of the other States were to serve for models, as being embodiments of the largest liberty. Under these influences the Convention made incredible speed, the entire declaration of rights was settled in a single evening session, and it was only the more practical details of the payment of representatives, the district system, the admission of free blacks, &c., &c., that led to more discussion. The proceedings were conducted with tolerable decorum, and that general knowledge of parliamentary forms, which seems native to the American. The speeches in one respect were less American, for they were short, and it was only occasionally that a touch of the backwoods-man betrayed itself. The treatment of the topics was strikingly jejune. That such an assembly should not go profoundly into the philosophy of legislation, or the experience of other times and countries was natural, and on the whole sensible, but a little more enlargement of view in the appreciation of modifying circumstances, and some knowledge of the received constitutional maxims might have been expected. The *naivete* of ignorance went sometimes far enough, as when one of the sages of the assembly pronounced that the *habeas corpus* dated from 'the first Justinian.' But with all this, these natural-grown legislators drew up in a few weeks a constitution, neither better nor worse than those of many of the other States; the people adopted it, and the whole political machine went into operation without opposition. California continues, it is true, to be somewhat unsettled in

civil affairs, and their administration is neither in very trustworthy hands, nor sufficiently regular and efficient. But reasonable allowance must made for the extraordinary circumstances in which they have been placed, and the assurance of a gradual improvement.

"The sum of the whole matter is, that a State has been brought into existence without historical antecedents, simply by a present general consent of individuals; the democratic principle in its freest development has been applied, and the operation in practice is found tolerable. Sound sense and the habit of liberty have enabled men without cultivation and with little other qualification to accomplish a task in which the most advanced nations of the old world have utterly failed, amid greater difficulties, it is true, but with far greater means at their command.

"Equally interesting, but in quite another view, is the recent experiment in Massachusetts. In this State, the seat of the highest culture and a social life the most honorable to America, the constitution has been twice altered since the separation of the colonies; the last time in 1820. A new revision was proposed and eventually decided upon by the people, and a Convention elected to prepare amendments for their adoption. The call for the Convention was carried by but a small majority, (66,416 against 54,112), and Boston, rich and conservative, strenuously opposed a change.

"A very numerous Convention met on the 4th of May, 1853, and by the 1st of August had formulated the result of their deliberations in eight distinct propositions of amendments. The labor proved fruitless. The amendments were severally rejected by the popular vote, though by slender majorities, the affirmative ranging from 60,000 to 67,000, and the negative a little over 68,000.

"But the proceedings are none the less in the highest degree interesting and instructive, and we are under obligations for the full report officially published. It is impossible not to speak with the highest respect of the great abilities, the political education, and the various knowledge of many of its members; and, take it for all in all, democracy as developed in Massachusetts, one of the most advanced of the United States, leaves a favorable impression. Nor is it merely the successful cultivation of parliamentary eloquence that claims our acknowledgment, but the maturity of thought as well, and the extent of information. There is indeed an obvious inferiority both in general and political education on the part of the more

radical and ultra-democratic leaders, diverging occasionally into ill-breeding and breaches of decorum. The conservatives have the advantage in statesmanship and skill. Such men as the ex-United States Senator Choate, the United States Attorney Hallett, Professors Greenleaf and Parker, several of the ex-governors, and particularly the advocate Dana, whose speeches show equal ability, judgment, and independence, would do honor to any deliberative assembly in the world.

"This is not the place to treat of the particular questions before the Convention. They did not, of course, disturb the foundations of the political system. The existing representative democracy with its distribution of powers, was assumed. The propositions were to equalize the representation, which is not exclusively according to population, but modified by the element of town corporations, which are less populous in the interior than near the seaboard; and to introduce the later developments of democracy existing in other States, viz., popular election of all officers, judicial and administrative, with many other subordinate points. Most instructive are the proceedings which involve this development of the democratic principle, both as indicating the extent of its operation, and how its strictly logical consequences were occasionally sought to be avoided, sometimes on the ground of impracticable and mischievous results, sometimes as interfering with particular party-policy. Thus the distinctively so-called 'democratic' party was in some embarrassment in two instances: to maintain the system of town-representation against the numerical equality principle of democracy; and, again, to elude the claim of suffrage for women, which is the unavoidable consequence of their principles, but repugnant to their common sense.

"The conservatives were no less at a frequent disadvantage in not venturing to impugn the principle that in a democracy the people are not only the source of power and entitled to an administration of it, agreeable and responsible to themselves; but, what is more, that they ought to take as direct a share as possible in all parts of government. On all such occasions, the question, 'Do you then distrust the people?' was thrust before them like a Medusa's head. It is hardly to be doubted, that, although not sanctioned by the popular vote in this case, the more democratic development will ultimately prevail even in Massachusetts. But it is no less probable that, at

some future day, the practical results must lead to a re-examination of the premises. Not certainly that democracy, as such, will cease to be acknowledged, but it would seem necessary that some acknowledgment of the co-existence of other principles should be obtained. It may then be seen that no less in a democracy than in other governments, the exercise of political functions, such as the suffrage, is not a bare right, but in the nature of a public trust, to the discharge of which certain qualities may properly be required; that a competent judgment of the qualification of candidates depend upon a knowledge of affairs and of men, and is not to be expected of the generality of persons, except in relation to their more local concerns.

"It lies unfortunately in the nature of the case, that nothing less than some signal calamity or a continuous succession of sensible evils can produce so general and strong a persuasion of the fallacy of the present views, as to be of any avail. It is the misfortune of the democratic form, that it is much more difficult than in any other to effect peacefully any limitation of the principle of the government; since this can only proceed from a perception on the part of the masses of their own incompetency, and of the errors into which they have fallen. There is no powerful 'pressure from without,' such as the national will, or an influential class brings to bear upon a monarch. To resign from the modesty of increased self-knowledge what we have once assumed as rights, is not a light matter, least of all in a democracy where the doctrine of a mysterious capacity for and an eternal title to self-government on the part of the masses, is elevated into a formal article of faith by the rival flatteries of competitors for their power and favor."

Notes of Cases in New York.

Circuit Court of the United States. In Admiralty.

Opinions by Nelson, J.

September 15, 1856. The Colombo.

Bill of lading — Contents unknown.

Goods were shipped at Hamburg for New York, in packages slightly made, in the form of barrels or hogsheads, bound round with matting and well secured with cords. Upon arrival, one of the packages was broken, and the goods damaged. It was proved that the damage might probably not have been discovered upon an ordinary inspection of the package, nor upon lowering it into the hold of the vessel. There was no evidence of the condition in which the goods were shipped, excepting the bill of lading, which said, "Weight and contents unknown." *Held*, that there was not sufficient evidence to prove that the package was whole when delivered on board the vessel.

September 25. Griffith v. Wortman.

Admiralty — Maritime contract — Jurisdiction.

Nelson, J. delivered the opinion substantially as follows: — The libellant is the owner of a ship-yard, together with apparatus, consisting of a railway cradle and other fixtures and implements, used for the purpose of hauling up vessels out of the water, and sustaining them while the repairs are being made. Certain rates of compensation are charged, regulated by the tonnage of the vessel, for hauling her up on the ways, and a per diem charge for the time occupied while she is undergoing the repairs, in cases where the owner of the yard and apparatus is not employed to do the work, but the repairs are made by other ship-masters, as in the present instance.

The main controversy in the court below related to the terms upon which the service was to be rendered. Judge Hall, who heard the case, settled the amount, upon his view of the evidence, at $631.97, and I am not disposed to interfere with it. The proofs are conflicting, and not very clear either way in respect to the agreement.

The doubt I have had in the case is upon the objection taken to the jurisdiction of the court, a point not taken in the court below. It is claimed by the counsel for the respondents, that the agreement for the service rendered is to be regarded, simply, as a hiring of

the yard and apparatus; and, certainly, if this is the true character of the contract or transaction, there would be great difficulty in upholding the jurisdiction. On the other side, it is contended that the service rendered is a service in the repairs of the vessel, and is as much a part of them as the work of the ship-master, or the materials furnished by him.

There can be no doubt, that in the cases where the ship-master, owning the ship-yard and apparatus, is employed to make the repairs, the service in question would enter into and become part of the contract, and thus be the appropriate subject of admiralty jurisdiction. And the question is, whether any well-founded distinction exists between a transaction of that character and the present one. The owner of the yard and apparatus, together with his hands, superintends and conducts the operation of raising and lowering the vessel, and also of fixing it upon the ways, preparatory to the repairs.

The service requires skill and experience in the business, and is essential in the process of repairs. I do not go into the question whether this is a contract made, or service rendered, on the land or on the water; it undoubtedly partakes of both; for, I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to for the purpose of ascertaining when the admiralty has, and has not, jurisdiction. The nature and character of the contract, and of the service, have always appeared to me to be sounder guides for determining the question.

Although I agree a distinction may be made between this case, in the aspect presented, and that of the case where the ship-master is employed to make the repairs, I am inclined to think that it is not a substantial one, and that to adopt it would be yielding to a refinement that I am always reluctant to incorporate into judicial proceedings. A distinction, to be practical, should be one of substance, and that would strike the common sense as founded in reason and justice.

I must, therefore, overrule the point of jurisdiction, and affirm the decree.

Howard v. Cobb.

Passenger contract — Non-performance at the day — Excuse.

Nelson, J. — This libel was filed by Cobb against the respondents, to recover for a breach of contract to carry certain passengers in the steamship New Orleans from Panama to San Francisco, the vessel to leave on her trip in the month of April, 1850. The fare paid was $150 for each passenger, and an engagement given for the passage in the form of a ticket. This suit involves the amount of ten tickets. The ten purchasers presented themselves

at Panama on the 1st of April to take their passage, but the Orleans had not then arrived, and did not till the month of August following. She had left the port of New York in February, but had encountered rough and stormy weather, and was obliged to put into St. Thomas for repairs, where she was detained a long time, which was probably known to the passengers at Panama. The brig Anna, belonging to the libellant, was at this place in April, and sailed thence to San Francisco on the third of the month. The ten passengers whose tickets are in question took passage in her, and transferred these tickets to the master, which were received for their fare. This libel is filed to recover the amount, $1500, and interest. The court below decreed in favor of the libellant.

It is objected that the suit is not in the name of the original parties to the contract for the passage; but it is every day's practice in admiralty to allow suits to be brought in the name of the assignee of a *chose in action*. The libellant is the real owner of the tickets, and, therefore, the proper person to bring the suit, and in his own name.

It is also objected that the disabling of the New Orleans by stress of weather excuses the fulfillment of the contract at the time provided for. How this might be in a case where the passenger was on the vessel at the time of the casualty, causing delay in the voyage, it is not now necessary to determine. Certainly, until the passenger become connected with the vessel as a passenger on board, he is in no way subject to her casualties and misfortunes occurring through stress of weather or otherwise. He is a stranger to her. The contract bound the owner to have his vessel at the place and time designated; that he had stipulated for as a part consideration for the price paid, and assumed upon himself the responsibility of performance; and the failure operated a breach of the engagement, and subjected him to a return of the price paid. The winds and waves or weather are no excuse for the non-fulfilment of a contract as to the time of the commencement of the voyage. If these circumstances had been intended as elements of it, they should have been expressly provided for by the owner, and then all parties concerned would have understood it.

It is said that the passengers should have waited the month of April, and that the owner had the whole month to furnish his vessel there. Admitting that he had the month, the utmost that can be claimed is, that the passengers took the risk, if the vessel arrived within the month, of losing their right to demand a return of the fare. There was no abandonment of the voyage, for the tickets for the passage money were appropriated to the completion of it. The passengers, doubtless, knew the disabled condition of the Orleans, and that she could not arrive at Panama in time to fulfil her engagement; and it would have been an idle act to have waited the month, especially as there seems to have been no pro-

vision made by the owners for a substitution of another vessel, nor indeed, for aught that appears, any interest or concern taken in the matter.

The decree below I think right, and it must be affirmed.

September 12. THE THOMAS MARTIN.

Collision — Lights.

The Thomas Martin was libelled by the owners of the Industry for loss of the latter vessel off Great Egg Harbor, on a cloudy night in May, 1849. The Industry was on the larboard tack, and had a bright light in her forerigging, which was seen by the crew of the Martin about fifteen minutes before the collision. The Martin had no lights, and was seen by the crew of the other vessel only a few minutes before the collision. Both vessels luffed. In the District Court the libel was dismissed, because the Industry was bound to give way, and should have ported her helm.

Held, both vessels were in fault. The Industry for the reason above given, and the Martin because she ought to have shown a light after discovering that of the Industry.

On this point NELSON, J. said: — But I am unable to concur with the court below in the other branch of the case, namely that the Martin was not in fault. I do not intend to disturb the general usage that prevails both in narrow rivers and in open seas, that sailing-vessels are not bound to carry lights when under way at night. This usage has long prevailed, and has been recognized to a certain extent by the courts generally in this country and in England. It was said, on the argument, that the rule had been recently changed in England by the Trinity Masters. The soundness and propriety of the usage have often been questioned heretofore by eminent judges both in England and in this country. The fault, I think, chargeable upon the Thomas Martin, is her neglect to show a light after she discovered the light of the Industry. If she had done so, there is every reason for believing the collision would not have occurred. As we have already shown, at this time the two vessels were from two to three miles apart, and within this distance, while running with the combined speed only of ten or twelve miles the hour, if each vessel had seen the other, it would have been strange if they could not have avoided the meeting. Although the night was not unusually dark, yet the sky was so overcast and cloudy that it is admitted a vessel could be seen without a light not exceeding half a mile. While, therefore, the hands on the Thomas Martin had fifteen minutes more time, and the distance of some two and a half miles running, within which to adopt the proper measures for avoiding the Industry, the hands on board of her had only some three minutes time, and half a mile's distance, within which to adopt the like measures. The practice of showing lights when a vessel is approaching in a dark or cloudy night, is common among

prudent and skilful navigators, and has frequently been a subject of commendation by the courts, and taken into consideration in determining cases of this description. Its fitness and propriety are too obvious to require illustration or argument. This case furnishes a striking exemplification of its necessity, and of the misfortune attending its neglect. The danger was impending almost at the moment of the discovery of the Thomas Martin, and this from neglect in not showing a light at the proper time.

Supreme Court. First Judicial District. General Term. September, 1856.

Before Roosevelt, Clerke, and Whiting, JJ.

Ely *v.* Spofford and Tileston.

Agreement — Construction.

The plaintiff, believing that the defendants and other importers of foreign merchandise, had been overcharged by the collectors of the customs, under color of the Tariff Act of 1846, for duties on sugar and molasses, proposed to recover, and cause to be refunded any excess of duties so paid to the government of the United States. The defendants accordingly signed a stipulation, bearing date October 13, 1848, in which they authorized the plaintiff to recover any duties or excess of duties illegally exacted of them, and furthermore agreed to pay him one half of the sums of money so recovered, or, in case they should prefer it, such reasonable compensation as should be agreed upon, or fixed by referees to be chosen for that purpose. Opposite to the signature of the defendants to this stipulation the following words were written by them: "*Not to interfere with any other arrangement already made.*" This action was brought to recover, by way of compensation for services, a commission of fifty per cent. on duties alleged to have been refunded to the defendants through the instrumentality of the plaintiff, and in consequence of his services. The jury found a verdict for the plaintiff for $5153.25. The defendants appealed. It was proved on the trial, that in February, 1848, previous therefore to the agreement between plaintiff and defendants, the latter had employed Earl Douglass and Henry Ogden to prosecute their claims against the government, that they were actually engaged in that business in October, 1848, that their influence and exertions contributed largely to the result by which the duties were refunded to the defendants, and that they had to be, and actually were liberally remunerated. It appeared, also, that the plaintiff had knowledge of the preëxisting employment of Messrs. Douglass and Ogden.

Held, that the judge at the trial erred in charging the jury, that in fixing the liability of the defendants, they were not to take into

account the expenses paid by the defendants to parties employed under the prior contract of February, 1848. The plaintiff was not entitled absolutely to one half of the amount of duties refunded to the defendants, but only to a just and equitable compensation, having regard to his services and the services of the agents already employed. New trial ordered.

C. P. Kirkland, for plaintiff.

F. B. Cutting, for defendants.

Baumgartner *v.* Fowler.

Statute of Frauds.

A contract to supply a milkman for one year with milk, although to the extent of more than $50 in amount, is not, (under the authorities,) within the statute of frauds. Such a contract, if sufficiently proved in other respects, especially where there has been a part delivery, may be enforced whether written or verbal.

Chrystie and Wife *v.* Phyfe.

Construction of will — Devise, whether for life or in fee.

Mrs. Chrystie, the only surviving child of Charles Ludlow and Margaret his wife, (both now dead,) and grand-daughter on her mother's side of Thomas Mackaness, claims under and by virtue of a will, executed by her grandfather in 1806, to be the owner of a house and lot in the city of New York, in possession of the defendant, and conveyed to him in 1815, by a deed of warranty, signed and executed by her father and mother.

By the fourth article of the will, the testator gave the house and lot in question to his daughter Margaret, (at that time unmarried, afterwards Mrs. Ludlow,) her heirs and assigns forever; but if she should die unmarried, and without leaving a child her surviving, then he gave the house and lot to his married daughters, their heirs and assigns forever, in equal parts, to be divided; but if she should die either before or after his decease, leaving lawful issue, then he gave them to such child or children, if one only, to him or her solely, and his or her heirs and assigns forever; if more than one, to them, their heirs and assigns forever, equally to be divided between them, share and share alike.

Roosevelt, J. — It seems clear that the testator did not intend that his daughter Margaret should take a mere estate for life, and nothing more. Her estate was in perpetuity, with full power to convey, by will or deed, to whom she pleased, in fee simple, with no possibility of being reduced to a mere life estate, except in the one event of her leaving no child; her children were to take under the will, not as direct devisees of their grandfather, but if at all, as heirs of their mother, and of course subject to their mother's acts

in her lifetime. The result is, that Mrs. Ludlow took an estate in fee, defeasible by law, in the event of her dying before her father, and defeasible by will, in the event of her dying after him, leaving no issue. Having survived her father, and having left issue, her estate in fee both vested and became absolute in her, and as a consequence in her grantor Mr. Phyfe. Judgment for defendant.

CLERKE, J., *dissenting*. — I am of opinion that Miss Mackaness, afterwards Mrs. Ludlow, took no absolute fee in the estate, notwithstanding the words of inheritance in the first clause of the fourth article of the will, that those words are divested by the subsequent clauses of their usual efficacy, and that the limitations over reduced her interest to an estate for life; and, at her death, an absolute fee vested in her daughter Mrs. Chrystie.

M. S. Bidwell, for plaintiffs.

B. F. Butler, for defendant.

KALT *v.* LIGNOT.

Costs under the code of procedure.

Section 303 of the Code, provides that there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action; which allowances are termed costs.

By section 304, costs shall be allowed of course to the plaintiff upon a recovery, in an action for the recovery of money, where the plaintiff shall recover fifty dollars or more.

Section 305 reads as follows: "Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein."

CLERKE, J. — Section 305 of the Code does not mean, that the defendant shall be entitled to costs against the plaintiff in all cases where the plaintiff is not entitled to them. This section must be read in connection with and controlled by section 303. A mere reduction to the plaintiff's demand, by set-offs, or any other description of counter claim, below the amount of fifty dollars, does not entitle him to costs against the plaintiff.

Before ROOSEVELT, CLERKE, and STRONG, JJ.

September, 1856. WETMORE *v.* STORY.

Ninth avenue railroad — Power of Common Council.

ROOSEVELT, J. — Messrs. Wetmore, Hoppoch & Stuart, of this city, and also owners of property on Greenwich and Washington Streets, complain that the defendants, under the name of the Ninth Avenue Railroad Company, and under color of a pretended grant from the city authorities, are about extending their rails through those streets, in front of the plaintiff's premises, to their great

injury and annoyance, and in violation of their rights. An injunction granted in the first instance, on their application to restrain the proceeding, was subsequently at Special Term dissolved, and the complaint dismissed. From that judgment the plaintiffs have appealed, insisting that the injunction originally issued, instead of being dissolved should be made perpetual.

On the part of the defendants, it is not pretended that every citizen has a right to lay a rail-track in the streets of the city. The corporation, however, it is claimed, may do it; or, in their discretion, by a resolution of the Common Council, may grant the privilege, as a franchise, to a particular individual or association of individuals. Such a grant, it is alleged, has been made in this instance. The judge so held at Special Term. He placed his final decision on that ground. And the question therefore is, can a resolution, adopted by the Board of Assistants in one year, be concurred in by the Board of Aldermen in another year, so as to make it, without consulting the existing Board of Assistants, an ordinance of the Common Council? Or must it, as in the case of unfinished business in other legislative bodies, be taken up *de novo?*

When the charter of 1830 declared that "the legislative power of the Corporation of the City of New York should be vested in a Board of Aldermen and a Board of Assistants, who together should form the Common Council of the city," it must be considered as having adopted by implication, so far as applicable, the universally recognized principles of *legislative* bodies, constituted of two independent branches.

The settled practice and understanding, — indeed, we may say the common law, — of such bodies, as illustrated in the Congress of the United States, the Legislature of this State, and, it is believed, in the Legislatures of every State in the Union, as well as in the Parliament of Great Britain, repudiates the idea that the Board of Aldermen of 1853 could take up and pass the resolution of the politically deceased Board of Assistants of 1852, and give it effect as law, without consulting the newly elected body. It might have been, although not so in the present instance, on the express ground of opposition to the particular act of their predecessors, and for the express purpose of preventing its consummation.

No case has been cited in which the Senate of a State, or of the United States, or of the Upper House of Canada, or of Great Britain and Ireland, has attempted to give effect to the inchoate action of a previous Assembly, House of Representatives, or House of Commons, whose term had expired, and whose places were filled by others newly chosen in their stead.

To allow an opposite practice in the legislation of the City Common Council since its new organization would be at times to defeat the will of the constituents, clearly expressed through the regular channel of the ballot-box, and to render the elective franchise a nullity. Although the corporation of the city is a

continuous body, the Common Council, since its division into two branches, is not. Its legal term, like that of the State Legislature, upon whose model it was formed, is one year, and no longer. The Common Council of 1852 is not the Common Council of 1853.

The primary object of that act was to prevent the Common Councils of cities from permitting the construction of railroads in the streets of cities without the consent of a majority of property-owners immediately interested; and when it excepted from its operation railroads already "constructed in part," it meant those constructed under lawful authority, and not under "grants, licenses, resolutions or contracts," which had never been made, given, passed or entered into according to the charter; and which, therefore, having in judgment of law no existence, could not be "confirmed."

The confirmation intended was a confirmation as against the State, and not against the Common Council itself. An opposite construction of the act, instead of restraining the Common Council from permitting injurious railroads, would go to sanction roads commenced in violation of law, and which had never been permitted at all.

Having had, therefore, no warrant for its commencement, and none for its continuance, the road in question, under the evidence, is not only a public nuisance, of which the plaintiffs have a legal right to complain as specially injurious to them in their ingress and egress to and from their place of business on the street.

Such a nuisance, it is well established by numerous decisions, can and ought to be restrained by injunction, if demanded as in this case, by the parties specially aggrieved.

The judgment therefore of the Special Term, we all agree, should be reversed, and a perpetual injunction awarded.

CLERKE, J. — For the reasons above expressed in Judge Roosevelt's opinion, I concur in the conclusion at which both my associates arrived.

S. C. Beardsley and *J. Van Buren*, for plaintiffs.

C. O'Conor, for defendants.

Common Pleas for the City and County of New York. General Term. — July, 1856.

Before INGRAHAM and BRADY, JJ.

MORSS *v.* SHANNON.

Payment and satisfaction.

Action for the unpaid balance of a judgment, by the assignee thereof. The judgment was for the sum of $508. The defendant had paid the agent of the assignors $100 in cash, and given him his notes for $150, and the agent thereupon gave the defendant a

receipt in full payment and satisfaction of the judgment, provided said notes should be paid at maturity. They were so paid.

Held, that notwithstanding the receipt and the fulfilment of the agreement as to the payment of the notes, said agreement was without consideration, and the defendant was not discharged from paying the balance of the judgment.

Bowman and *Greene*, for plaintiff.

F. Byrne, for defendant.

Garret *v.* Taylor.

Wages — Forfeiture.

Action for $64 arrearage of wages alleged to be due the plaintiff for the labor of his son. When the son went to work for defendant, defendant said he gave his boys three dollars a week, and kept back half a dollar a week till the expiration of their time, so that if the boy stayed his time out, and behaved himself, it would be a good sum of money for him when his time was out. The boy became delinquent and negligent, but not guilty of gross misconduct. Some days he came late to his work, some days he stayed away altogether, and a proportionate deduction was made from his wages for the time thus lost. He was finally discharged.

Held, that the sum of fifty cents a week reserved by the defendant, was so retained for some purpose or object of discipline, and not as an absolute forfeiture on any contingency whatever. Forfeitures by implication are not favored. Judgment for plaintiff affirmed.

A. C. Morris, for plaintiff.

W. G. Brown, for defendant.

Field *v.* Paulding. Brown *v.* The Same.

Judgment and execution.

Judgments were docketed in these actions, and executions issued in 1848. It was subsequently discovered that the sale under these executions was void, inasmuch as they purported to be on judgments in the Supreme Court. In April, 1851, the plaintiffs, on application to this court, obtained leave to issue executions anew, for the whole amount of the judgments. Again, in February, 1856, executions were issued without leave of the court.

Ingraham, J. — These last executions must be set aside, as they were issued after the lapse of more than five years from the date of the judgments, without leave of the court, as required by the Code. The order made in 1851 cannot be considered as a substitute for the order required. The order of 1851 was obtained by the plaintiffs, in order to relieve themselves from the consequences of the erroneous proceedings upon the first executions. Those

executions were a nullity, and they might have been disregarded, and the executions of 1851 might have been issued without the order granted in that year.

S. Sanxay, for plaintiffs.

S. Sherwood, for defendant.

Walker *v.* Isaac Swazzee and Caroline his Wife.

Parties — Husband and wife.

Action for damages for breach of contract to repair premises rented to the plaintiff by Caroline Swazzee. The judgment for plaintiff, on appeal to this court, was reversed; as to the husband, on the ground that inasmuch as the action related to the separate property of his wife, he ought not to have been joined; as to the wife, on the ground that no next friend was appointed to appear for her as required by the Code.

W. C. Carpenter, for plaintiff.

M. C. B. Wilcoxson, for defendants.

Carpenter *v.* Taylor.

Is a restaurant an inn?

Action for the value of an opera-glass, left by mistake in defendant's saloon.

Held, that a restaurant is not an inn, so as to subject the keeper to the liability of innkeepers.

In order to charge a party as innkeeper, it should appear that his premises were kept as an inn for the accommodation of travellers. Therefore, a person who enters a restaurant for a meal, is not to be deemed a guest or traveller, entitled to the protection which the law gives against innkeepers.

D. Y. Walden, for plaintiff.

S. D. Cozzens, for defendant.

Surrogate's Court. September 12.

Before Bradford, J.

In the matter of the estate of Margaret Robertson, deceased.

Law of domicile — Distribution of personalty — Scotch law.

The Surrogate. — The intestate died at the Marine Hospital, Staten Island. At the time of her sickness she was on her way from Scotland to Canada West. Her surviving relatives are three brothers of the whole blood, and two brothers and two sisters of the half blood. The question is, in what manner distribution of her estate is to be made. The test in respect to succession to the

personal estate of intestates is the law of the domicile at the time of the death. This is an universal rule at this day, though in some countries there has been a struggle against it, before the law has become finally settled.

The deceased was a native of Scotland, and her domicile of origin was at Kirkstile, Perthshire. She died while *in transitu* to Canada West, and therefore had not gained a new domicile. A domicile can be acquired only by a residence, with the intention of remaining at the new place of abode. Intention alone is not sufficient. A domicile can be established only *animo et facto*, by a unison of the fact and the intention (Pothier Cour d'Orleans, ch. 1, § 1, art. 9). In the present instance there was the intention without the fact, the party not having yet reached her proposed home, but dying on the journey. Though the death occurred in this State, our law of distribution does not apply, for there was no intention to establish a domicile here. It is a well settled principle that for the purposes of succession every person must have a domicile somewhere, and that the domicile of origin is not lost until a new one is acquired. Under the circumstances, therefore, I have no doubt that the distribution of this estate must be regulated by the law of Scotland, the intestate's domicile, which had not been changed by the mere intention to remove to Canada, and her decease on her journey.

In Scotland succession is confined to *agnati* or relatives on the father's side, to the exclusion of *cognati*, relatives on the mother's side. But of the kindred through the father, some may be of the full blood, as brothers and sisters *german*, and some of the half blood, as brothers and sisters *consanguinei*. It is well settled, in contradistinction to the English rule, that among collaterals, kindred of the full blood exclude those of the half blood in the same line of succession (Bank., b. 3, tit. 4, s. 17, 28; Erskine, b. 3, tit. 9, s. 2, 4; Bell's Principles, 672; Robertson on Succession, 379). The next of kin take the estate *per capita*, and never *per stirpes*, there being no right of representation among descendants or collaterals (Erskine, *ubi supra*). In reckoning the degrees of kindred, the mother of the deceased is always excluded from the succession, and brothers and sisters or their descendants take in preference to the father. It is not material then to inquire whether in the present case the intestate left a father or mother, or children of a deceased brother or sister. The brothers of the full blood must in any event succeed to the entire estate. As executors dative have been appointed in Scotland, and the administration here is merely ancillary, the decree will declare the brothers of the whole blood entitled to the succession, and direct payment to the Scotch executors dative for distribution at the place of domicile.

Notes of Recent Cases in New Hampshire.*

June Term, 1856. *Rockingham.*

WEBSTER *v.* WEBSTER.

Equity — Waste — Answer setting up mistake in deed.

A DEED conveying land in fee simple contained a reservation in these words; "reserving all the right, title, and interest in and unto the above named land and buildings for and during my natural life." *Held*, that the reservation did not give a tenant for life the right to cut down and sell wood and timber.

Where the complainant in a bill for an injunction to restrain waste, claims title to the land under a deed from the defendant, the defendant cannot set up by his answer and show by parol, in defence to the bill, that there was a mistake in the draft of his deed to the complainant.

WATRIS *v.* PIERCE.

Covenant broken — Discharge by change of terms in contract — Usury.

The plaintiff declared in covenant on a bond dated August 15th, 1851, setting forth that whereas the plaintiff had lent to one Nott, of Boston, agent of the Portsmouth and Concord Railroad, the sum of $20,000, and had taken his two notes therefor, each payable to his own order and by him indorsed, for the sum of $10,000, and each payable in two years with interest semi-annually; and that Nott had conveyed to the plaintiff six hundred and seventy-two shares of the capital stock of the railroad as collateral security for the payment of the notes; in consideration of one dollar and of other good considerations, the defendants covenanted with the plaintiff, that if the notes should not be paid at maturity, or if any part of the interest should remain unpaid at the maturity of the notes, they would, on demand, take a conveyance of the railroad stock and of the notes, and would pay therefor whatever sum of principal and interest that might remain due on the notes or either of them. The declaration also contained averments of performance by the plaintiff of all the conditions precedent set forth in the bond.

The defendants pleaded that, on the 14th of August, 1851, it was agreed between the plaintiff and Nott, that the plaintiff should convey to Nott three lots of land, containing about seven acres,

* Continued from page 349.

adjoining Mount Auburn Cemetery, and should also furnish Nott $10,000 in cash; in consideration for which Nott should give his notes for $20,000, averaging twenty-four months time, with $60,000 of the capital stock of the Portsmouth and Concord Railroad as collateral security, with an agreement of responsible men to the plaintiff that they would take the stock and pay the cash for the same at the amount for which it was pledged, in the event that Nott should fail to pay the notes and interest; that thereafterwards, on the 15th day of the same August, Nott applied to the defendants to become bound to the plaintiff, stating to them the terms, of the agreement, and representing that if they would give to him their deed, it should be delivered on those terms, and thereby he would obtain the $10,000 of the plaintiff, and would be able to raise a further large sum by the sale or mortgage of the land; that the defendants, upon these representations, as sureties for Nott, and to enable him to obtain the money and land, signed the bond, to be delivered upon the agreement aforesaid; yet that the plaintiff refused to perform his agreement by delivering to Nott the $10,000, and conveying to him the land; and though he knew of the representations that had been made, and the purposes for which the bond was placed in the hands of Nott, it was thereafterwards, on the 16th day of the same August, fraudulently and covinously agreed between Nott and the plaintiff, without the consent or knowledge of the defendants, that instead of $10,000 being paid to Nott, he should receive the sum of $8317, and that the balance should be applied for two years' interest in advance for one of the notes, and one year's interest on the other; and that Nott, on taking a conveyance of the land, should mortgage the same back to the plaintiff to secure the payment of one of the notes, in addition to the security of the railroad shares; that thereafterwards, in pursuance of said fraudulent agreement, the various matters therein stated were performed by the plaintiff and Nott, in fraud of the defendants, and without their knowledge and consent; by which fraudulent and covinous change in the terms of the original agreement, Nott was prevented from receiving the full sum of $10,000, and was also disabled from receiving any further sum of money by the sale or mortgage of the land, and so disabled to pay the defendants the sum they might pay as his sureties by reason of the bond. The plea also averred that Nott took and applied the money to his own use, and that the defendants were sureties for him. And so the bond was obtained from them by the fraud and covin of the plaintiff and Nott.

The defendants pleaded, secondly, that the plaintiff and Nott were both residents of Massachusetts at the time the notes were given, and the deduction of interest made thereon; that the land conveyed to Nott was not worth more than $5000; that the transaction was usurious under the statute of Massachusetts, and they claimed a deduction from the amount of the notes under the statute of that State against usury.

On demurrer to the pleas —*Held*, that the first plea was good; that the undertaking of the defendants was collateral to that of Nott, and that the plea set forth a valid defence. *Held also*, that the second plea was bad; that the statute of Massachusetts applied only to the remedy, and could not be enforced in this State.

Salem *v.* Edgerly.

Contribution by several holders of property mortgaged.

Where several purchasers of different parcels of the property covered by the same mortgage, stand *in equali jure*, they are bound to contribute to the redemption of the mortgage in proportion to the relative value of their respective parcels. Where one of such purchasers paid to the holder of such a mortgage the full amount of it, it was *held*, that he could not avail himself of such mortgage to compel any other purchaser to pay more than his proportionate share of the mortgage, unless he had some equitable claim to be exonerated from contributing, which was not asserted here.

Ham *v.* Goodrich.

Parol agreement to convey land — Part performance — Statute of frauds.

Upon a bill in equity praying for the specific performance of a verbal agreement to convey lands, the part performance required to take the case out of the operation of the statute of frauds, must be such as to place the party seeking the specific performance in the situation to be held liable as a wrongdoer, on account of the acts done in part execution of the agreement, and against which liability he would be protected by its complete execution.

Possession of the land is not such part performance, unless the possession be delivered in pursuance and part execution of the agreement charged in the bill, and the party exercising the possession would be liable as a wrongdoer therefor without the specific performance prayed for.

By an agreement between a father and his son, that if the son with his family would come and live with the father, and take care of him and of his farm so long as he should live, he would give the son his homestead farm, it is not implied that the father would give up the possession of the farm to the son during the life of the father, such possession not being necessary for the fulfilment of the proposed conditions.

Such an agreement is to be construed as a contract by the father to give to the son, in case he should fulfil the conditions proposed, a title to the farm by a testamentary devise or other instrument of conveyance, to take effect at the death of the father, and such agreement being charged in the bill, possession of the farm by the son during the life-time of the father is not possession delivered in part execution of the contract charged.

If, however, it is to be considered as implied in the agreement

thus charged, that the son should have the possession during the life-time of the father, and thus the possession be held to be in part execution of the agreement, still it is not such part performance as would take the case out of the statute as the complete performance of the residue of the contract, namely, the conveyance of the title at the death of the father, would not have the effect to protect him against liability as a wrongdoer, on account of exercising the possession in his father's life-time.

July Term, 1856. *Sullivan.*

BAILEY *v.* COLBY.

Sale of Chattels on which is a lien — Tender.

The defendant sold a pair of steers to Young, on the condition that the steers should remain his property till they were paid for. Young sold them to the plaintiff, who knew of the defendant's claim. Shortly after, the plaintiff and Young went to Colby to settle for the steers, and the plaintiff offered Colby the balance due for them. Colby refused to take it, unless he was also paid his other claims against Young: and he took and drove away the steers. *Held*, in trespass *quare clausum* and for taking away the steers, that Young had an interest in the steers which he could rightfully sell, and if he sold only his interest, the sale would be valid, and the purchaser would take his right; though it would be otherwise, if the sale was absolute and regardless of Colby's rights. *Held also*, that the tender was good to vest the property in the plaintiff, Colby having no right to claim any more than the price agreed.

GLIDDEN *v.* TOWN OF UNITY.

Acts of selectmen of towns — Indentures of apprenticeship.

The acts of town officers within the scope of their authority may furnish ground for presumptions and inferences as against their towns in the same manner as such presumptions and inferences may arise against natural persons from their acts. The acts and accompanying declarations of one of the selectmen of a town in taking proper measures for preparing and presenting an account to the selectmen of another town for medical attendance upon a pauper having his settlement in such other town, may be presumed to be done with the assent of the other selectmen. And if the acts and accompanying declarations as part of the *res gestæ*, are of such character as to warrant the inference that a claim has arisen in favor of the first town against the other, on account of the medical attendance, they are evidence to the jury tending to show that the first town had agreed to pay for the medical attendance.

By indentures of apprenticeship between the overseer of the poor of the defendant town and the plaintiff, a minor pauper was bound as an apprentice to the plaintiff, until he should arrive at the

age of twenty-one years. By the terms of the indenture the plaintiff covenanted, among other things, that he would "provide suitable board, clothing, nursing, attendance, and other necessaries for the comfortable support of the minor in sickness and health — would give him an education sufficient for him to transact any business as a farmer or mechanic (providing he has capacity) — pay said minor at the age of twenty-one years, one hundred dollars, and give him two suits of clothes throughout, one to be a common every-day suit, and the other a meeting suit. Providing said minor should continue to be a healthy boy, and be a faithful servant during his minority." The minor became permanently disabled by an accident for any bodily labor. *Held*, that the condition relative to the minor's continuing to be a healthy boy was not to be limited to the stipulations for the payment of the one hundred dollars and the suits of clothes, but extended to all the conditions of the plaintiff, and that the indenture after the injury was void at his election.

A declaration in assumpsit that the defendant heretofore, to wit, on the 5th of October, promised to pay for the support of the pauper at the rate of five dollars a week for the first two weeks, four dollars a week for the next two succeeding weeks, and three dollars a week for the remaining time, is supported by proof of a contract made on the last of October or first of November to pay at those rates for the support, from the time of making the contract.

Campbell *v.* Cooper.

Action for enticing away a servant — Infant, when a servant.

To maintain an action for enticing away a servant, there must be proof of a service owing to the plaintiff by virtue of an agreement on the part of the servant himself, or some other person having authority to bind him to the service.

An agreement by the father for the services of his minor child, ceases to be binding upon the minor at the death of the father, unless made by indentures of apprenticeship in conformity with the provisions of the statute: and a parol gift of the child by the father gives no right to the services of the child after the death of the father.

The assent by the infant to a contract made by the father for services to be rendered by the infant for a time which extends beyond the life-time of the father, may be evidence of the infant's agreement to render the service for so much of the time as had not expired at the father's death; and such agreement gives the right to the service until such time as it is avoided by the infant.

The act of the infant in leaving the service in violation of the agreement, and under circumstances indicative of an intention to avoid it, constitutes an avoidance, and the master has no right to the service under such agreement from that time.

No action lies against a third person for holding out inducements to an infant rendering service under such agreement to avoid the agreement by leaving the service.

June Term, 1856. *Merrimack.*

Bean *v.* Bean and Trustee.

Disclosure of trustee.

The owner of real estate made a conveyance of the same to the widow of an intestate, upon a bargain made by her father, for $625; and notes against the grantor, belonging to the estate, to the amount of $475, were delivered to him. No administration had been taken upon the estate, and there was one minor child and other heirs to the same. It did not appear who paid the balance of the $625, or who gave up the notes, but the father of the widow, with his wife, moved into the house, and resided there with the widow and her family. An adult and married son of the widow, also lived in the house with the others. He made certain repairs upon the same, but no request to do them, from any one, was shown. Upon process served upon the widow, to charge her as trustee of the son, for the repairs made: — *Held*, that she was not the owner of the premises, and upon the facts above stated, could not be charged for the repairs.

To charge a trustee as debtor of a principal on a disclosure made, it must appear from the disclosure what amount is due, so that the court can definitely determine the sum.

Osgood *v.* Green.

Cattle impounded for nominal damages.

Where a statute provided that the damages done by cattle, taken in the enclosure of a party *damage feasant*, might be appraised by persons appointed by a justice of the peace, upon notice to the parties, and that their decision, whether any damages were done should, upon hearing had before them, be final and conclusive, and that the report should be delivered to the justice: — *Held*, that the justice was the mere depositary of the report; that no action upon it was to be had by him on its return, and that no notice of the time and place where it should be delivered to the justice was necessary to be given to the parties.

Cattle, taken in the enclosure of a party, cannot be impounded for a mere nominal trespass, where no damages are done. And where cattle were impounded, and the appraisers decided that no damages were done: — *Held*, that replevin against the impounder could be maintained for the cattle.

Morrill *v.* Foster.

Declarations in regard to lines of land — Statements of deceased relative.

Where the question was in relation to the lines of land, formerly holden in dower, it was *held*, that the whole of the report of the committee, appointed to set off the dower and make partition among the heirs, was admissible in evidence.

The declarations of a niece, now deceased, as to the time of an aunt's death, are admissible, though it appears that she lived at a distance, and other witnesses were present at the decease and funeral.

The declarations of a person deceased, as to the line of the dower, were held inadmissible, where he was seized of the residue in fee, and of a life estate in the dower, his interest being to enlarge his estate in fee.

An inventory, made by a plaintiff, as administrator of the estate of the person under whom he claims, in which the estate was not included, was held admissible as an admission, that the deceased did not own it.

Evidence, that a party, many years ago, started with a sleigh, saying he was going to W.'s for a load of goods, and presently returned with a load of goods of the value of his wife's interest in land, is no evidence of a conveyance of the land.

The declarations of a witness, though admissible to contradict his evidence, are not evidence of the facts stated; but if one of the parties claims, under such witness, and the declarations were made, while the witness held all the interest which that party now claims, they are admissible as evidence in chief.

Concord *v.* Pilsbury.

Set-off to an action of debt on bond.

In a debt on bond against a principal and his sureties, it was *held*, that a demand due from the plaintiff to the principal debtor may be set-off. The amount of the set-off, if not sufficient to bar the action, will be allowed against the sums found equitably due upon the bond, upon a hearing in Chancery. If there is another action pending against the same debtor alone, the plaintiff cannot require him to plead his set-off in that action. Nor is it any objection to such set-off, that the bond is given by a collector of taxes for the faithful discharge of his duties in collecting and paying over such taxes.

Manchester and Lawrence R. R. *v.* Fisk.

Action for railroad tolls — Establishment and notice of tariff and time — Evidence.

Tolls need not be declared for specifically as such; it will be sufficient, if the indebtedness is declared to be for freight and

transportation of goods, or for labor and services, or by any suitable terms to express the true nature of the claim.

It is not necessary that rates of toll on a railroad should be established by the directors personally; it will be sufficient, if they are fixed by the agent of the road under their direction.

Where a printed tariff of tolls is established, each of the papers so printed may be regarded as an original. If this were otherwise, it would be a sufficient explanation of the non-production of one of such printed tariffs, in order to the introduction of secondary evidence, to show that it was required by law to be and was posted at a particular depot.

It is not an objection to a tariff of freights, that it comprises the rates between stations of that road and others on connected roads.

Blanding *v.* Sargent.

Contract not to do business at a particular place — Statute of frauds.

Upon a demurrer to a declaration upon a contract in consideration of $200, to be paid in five years, to do no more business as a physician at Fisherville; *held*, that what is included in a name, descriptive of a place, is always matter for the jury, and that the uncertainty cannot be taken advantage of by demurrer. It was admitted the contract was not in writing. *Held*, that the statute of frauds did not apply. The contract may be completely performed within a year, if the promisor should die within that time. And however improbable that may be, it is enough to take the case out of the statute. If the consideration was at once paid, the agreement of the other party would for that cause not be within the statute, though it could not be performed within a year.

State *v.* Ferguson.

City ordinances.

By the provisions of the charter of the city of Concord, power is conferred upon the city council to make and establish ordinances and by-laws for numerous purposes specifically set forth in the charter; among which are ordinances and by-laws "to prohibit the selling or giving away any ardent spirits by any storekeeper, trader or grocer to be drunk, except by innkeepers duly licensed;" and "to forbid the selling or giving away of ardent spirits, or other intoxicating liquors, to any child, apprentice, or servant, without the consent of his parent, master, or guardian, or to any Indian;" and this specific enumeration is followed by a provision in the charter that the city council "may make any other by-laws and regulations which may seem for the well-being of the city, provided they be not repugnant to the constitution or laws of the State."

Held, that the power of the City Council to pass ordinances on the subject of the sale of ardent spirits, or other intoxicating liquors, was limited to the cases described in the specific provisions, — that the general provision was to be construed as referring to other matters, properly the subjects of police regulation, than those specifically enumerated; and that, consequently, an ordinance prohibiting the sale of intoxicating liquors to any person, without a license from the mayor and aldermen, was unauthorized by the charter, and void.

JOHNSON *v.* GREENOUGH.

Defective declaration in assumpsit — Error.

A declaration in assumpsit, that the defendant, on the day of the purchase of the writ, was indebted to the plaintiff in the sum of $60, balance of accounts, and being so indebted, after to wit, on the same day promised to pay, is bad as setting out a promise founded on a past consideration. A judgment, rendered in such case upon default, without an assessment of damages, upon inquiry by the court, or upon the verdict of a jury, is erroneous; and, upon error brought, the declaration cannot be amended, and the judgment being reversed, no other judgment can be rendered in the action.

BADGER *v.* GILMORE.

Revival of debt discharged by proceedings in bankruptcy.

An express promise to pay part of a note, discharged by proceedings in bankruptcy, revives the note *pro tanto*.

Evidence, that the maker, when called upon to testify in a suit upon the note against another party, expressed himself unwilling to testify, and declared that he preferred "to pay the note himself and would pay it;" at the same time saying that "a part of it had been paid, but enough remained due upon it to pay the holder," who had purchased it for a smaller sum than appeared to be due upon it, is competent to be submitted to a jury as showing that the maker expressly promised to pay so much of the amount due upon the note as would reimburse the holder for the sum paid by him for it; and revives the note to that amount.

A debt, discharged by proceedings in bankruptcy, is not extinguished, as by payment, but while it continues under the operation of the discharge it is incapable of being enforced by a suit upon it. The debtor, by an express promise to pay, *waives* the benefit of the discharge, and the debt is restored to its original condition of a legal liability.

A promissory note, while under the operation of such discharge, may be indorsed, and a new promise made to the indorsee, may be given in evidence to sustain a declaration upon the note by a subsequent indorsee.

Gilmore *v.* Gale.

Attachment of chattels subject to mortgage — Demand and account of amount due on mortgage.

Under the provisions of the statute, which declares that goods mortgaged may be attached as the property of the general owner, "the attaching creditor or officer paying or tending to the mortgagee, or holder, *the amount for which the property is holden*, to be ascertained, as follows, namely: the officer or creditor may demand of the mortgagee or holder *an account on oath of the amount due upon the debt or demand secured by the mortgage*, and the officer may retain the property in his custody until the same is given without payment or tender, and if such account shall not be rendered within fifteen days after the demand, or if a false account shall be given, the property may be holden discharged from the mortgage," a demand being made of the holder to whom the mortgage and mortgage notes had been assigned as collateral security for a debt due from the mortgagor to him, for "*an account, under oath, of the amount of the debt or debts, demand or demands secured by the mortgage*," and an account being rendered by the holder of the amount of his debt against the mortgagor for which the mortgage and notes had been assigned as collateral; it was *held*, that the terms of the demand were in conformity with the requirements of the statute, and that the account rendered was insufficient.

Mead *v.* Merrill.

Consideration of promissory note.

The plaintiff, a common carrier, sold out his wagons and team, and the good will of his business, taking two notes of the defendants as the consideration. One of the notes was signed by the father-in-law of one of the defendants as surety, upon the understanding that it constituted the whole consideration, the fact that the other note was given being purposely concealed from him, and he becoming surety with a view to aid his son-in-law in establishing him in the business: — *Held*, that this constituted no defence to a suit upon the other note against the makers.

Evidence that the business was unprofitable after the sale while carried on by the defendants, has no legitimate tendency to prove that it was so while carried on by the plaintiff, for the purpose of showing that his representations made at the time of the sale as to the profitable character of the business were false and fraudulent.

Towns *v.* Pratts.

Attachment — Necessary furniture and wearing apparel.

A travelling trunk, mahogany cabinet box, and breast-pin, are not exempted from attachment under the provisions of the statute which exempts from attachment and execution the necessary wearing apparel of the debtor and his family, and household furniture to the value of twenty dollars.

Brown *v.* Town of Concord and Congregational Society.

Devise for the support of a minister.

A devise of land to the town of Concord "for the use and support of the congretational minister, who shall exercise the duties of that office where the meeting-house now stands, forever," is not a devise upon condition that the town shall forever support such minister. Nor is the clause to be considered as a conditional or contingent limitation of the devise.

By virtue of such devise, contained in a will, taking effect by the death of the testator, prior to the repeal of the laws of this State, authorizing towns to raise money by public tax for the support of the ministry, the whole estate vested in the town; and whatever remedies any particular minister, church or society may have against the town in equity for enforcing the trust, if any arises, whenever there is no longer a minister, such as is described in the will, to whose use and support the land may be applied, the heirs or residuary legatee of the devisor have no interest in the disposition of the estate, and cannot maintain a bill in equity for an account of the monies received by the town upon a sale of the land, and for a decree that the amount unexpended in their hands be paid over to them.

June Term, 1856. *Hillsborough.*

State *v.* Johnson.

Indictment for concealing the goods of a debtor to prevent their being attached — Liquors sold on legal process.

In an indictment on the statute for concealing the goods of a debtor to prevent their being taken for his debt, it is no defence to show that the defendant, at the time of the concealment, held the goods under a fraudulent mortgage from the debtor, duly executed and recorded.

Nor, that the defendant, previous to the concealment, was summoned as trustee of the debtor in a process of foreign attachment, which was pending at the time of the concealment.

On such an indictment, to show that the goods were the property

of the debtor, within the meaning of the statute, it is competent to show that a mortgage previously made of the same goods by the debtor to the defendant, was fraudulent, though the taking of the fraudulent mortgage by the defendant was a distinct statutory offence.

Spirituous liquors may be taken on mesne process and on execution, and sold for the debt of the owner.

Bowman *v.* Manter.

Mortgage discharged.

Where a mortgagor paid and took up the mortgage note, but on the next day redelivered the note to the mortgagee, took back part of the money paid, had the balance indorsed on the note, and agreed that the note and mortgage should remain as security for the money repaid to him, and for a collateral liability of the mortgage: — *Held*, that the mortgagee having been once discharged by payment of the mortgage debt, was not revived as against a creditor of the mortgagor, who afterwards extended his execution on the land.

Kendrick *v.* Kimball.

Service of writ where defendant has left the State.

Where the property of a defendant, having his actual residence in this State, is attached on mesne process, the service of the writ must be completed by delivering to him a summons, or leaving it at his usual place of abode. If, after the attachment is made, and before a summons is served upon him, he leaves the State and does not return prior to the entry of the action, the court may order the action to be continued, and notice to be given of the pendency thereof in some newspaper, and upon evidence that the order has been complied with, judgment may be taken. And a judgment upon such notice will be good against the defendant within this State.

The defendant, on the 20th of October, 1851, was a resident of this State, and his property was attached on that day on a writ in favor of the plaintiff. Before the officer delivered him a summons, or left one at his usual place of abode, he went to California, and did not return prior to the sitting of the court at which the writ was returnable. Upon the entry of the action, the court, upon a suggestion of the facts, ordered the action to be continued, and notice of the suit to be given by publication in a newspaper. At the following term, on evidence that the order had been complied with, judgment was rendered against the defendant. In 1853, the plaintiff brought his suit against the defendant, and declared in debt on the above judgment. Upon a plea of *nul tiel record*, *held*, that the judgment was valid within the limits of this State.

Pattee v. Moore.

Witness in Chancery — Costs.

If a witness, in chancery, demur to interrogatories, and his demurrer is overruled, he will be charged with the costs of attempting to take his testimony, and the taxable costs of the case, pending the delay occasioned by his refusal to answer.

Lanphier v. Worcester and Nashua Railroad.

Right of way — Obstruction by railroad.

In an action for obstructing a right of way, on demurrer to the declaration; *held*, that a count for obstructing a way at common law, and a special count under the statute for obstructing a way by a railroad, after sixty days notice, may be joined.

That the statute applies to all railroads, as well those which have adopted the act, making railroad corporations public as others, and it is therefore not necessary to allege the corporation to be public, nor that it has adopted that act.

That it must appear by the declaration that the way alleged is a private way, or special damage must be alleged.

That if the plaintiff is alleged to be seized of "a lot of land in N——," the insufficiency of the description is no cause of demurrer, unless the way is alleged to be appurtenant to that land.

That the *termini* of a private way should be set out, and the want of such limits is cause of demurrer.

Flint v. Pattee.

Donatio causa mortis.

If a party, in his last sickness, and in expectation of his approaching death, make a promissory note, without any other consideration than his good will to the payee, and deliver it to take effect after his decease, it will not be valid as a ***donatio causa mortis.***

Fox v. Whitney.

Penalty for taking illegal fees — Taxation of costs by magistrate.

An attorney fee taxed in the bill of costs in a criminal cause before a magistrate is illegal, such fee being allowed only in cases where party costs are to be taxed; and there being no party plaintiff either for whom or against whom to tax costs in criminal proceedings.

The penalty given by the statute for demanding and taking illegal fees, is designed to restrain public officers from exacting unreasonable compensation for services rendered by them of an

official character; and the penalty attaches only in case of an illegal fee demanded by such officer, or by some other person for him by his assent, for a service performed by him, and as his compensation therefor.

A magistrate is not liable to the penalty, who has rendered judgment in a criminal proceeding for costs, including an attorney fee; the same being taxed and claimed by the attorney who conducted the prosecution, as compensation for his services; although the costs were paid upon the order of the magistrate to hold the respondent in custody till they were paid, and the magistrate receipted to the respondent for the costs upon their being so paid.

Alcutt v. Lakin.

Reservation in a deed of timber upon a lot.

A reservation in a deed of "*all the hemlock, spruce and birch timber in the wood lot*" on the premises conveyed, includes all the standing trees of those kinds in the lot suitable for timber.

A limitation of the reservation to trees "*measuring forty-two inches in circumference at the stump,*" does not exclude the bark upon such trees at the point of admeasurement in ascertaining the circumference.

Brown v. Dudley.

Trustee process before a justice of the peace — Trustee charged in former suit.

In trustee proceedings before a Justice of the Peace, where the plaintiff and principal defendant reside in one county, and the trustee in another, the writ should be directed to the sheriff of any county or his deputy, or to any constable of each of the towns wherein either of the parties is resident.

An omission to insert the proper direction, if the writ be served by the proper officer, is not fatal to the proceedings.

The bond provided for in such cases, is solely for the protection of the trustee, and is to be regarded as waived, if the trustee appear and disclose, and judgment be rendered against him without objection.

Evidence that the defendant has been charged as trustee of the plaintiff in a former suit, and the judgment satisfied, is competent to be received in bar of a claim for the same indebtedness for which the defendent was charged as trustee.

Such evidence is conclusive as to so much of the plaintiff's claim as was satisfied and extinguished by the payment of the former judgment.

The judgment against a trustee is not conclusive as to the original amount of his indebtedness to the principal defendant.

July Term, 1856. *Sullivan.*

FARNUM, APPELLANT, *v.* BRYANT, ADM'R, APPELLEE.

Waiver by an heir not named in the will of his father.

Where a child, not named or referred to in the will of his father, is entitled to the same share of the estate of the deceased as if he had died intestate, such child may waive or renounce his claim to any portion of the estate, by some unequivocal act of waiver or renunciation.

A petition of such child, addressed to the Judge of Probate, before whom the will is to be proved, and filed in the Probate office, written upon the back of a copy of the will, acknowledging its due execution, expressing satisfaction with its provisions, and praying the settlement of the estate according to its tenor, is a sufficient waiver and renunciation of his right to claim any share of the estate notwithstanding the provisions of the will.

Where all the children of a deceased father, none of whom are named in his will, unite in such waiver, and the will is proved, and the estate generally settled agreeably to its provisions, in consequence of such waiver; and the previous position of a portion of the children and of the estate is thereby changed, it is not in the power of one of the children to revoke such waiver on his part.

July Term, 1856. *Belknap.*

RUSSELL *v.* DYER.

Fraudulent conveyance — Levy on real estate — Rents and profits after levy.

A fraudulent conveyance is void against a pre-existing creditor of the grantor, and such creditor, having levied his execution upon the premises conveyed, is entitled to show the fraudulent character of the conveyance whenever it may be material for him to do so to defend his title against the claims of the grantee.

The rights and liabilities of the parties, in the proceedings whereby the land of a debtor is taken to satisfy the debt of a creditor, depend entirely upon statute law.

By the levy of an execution upon land, the judgment creditor acquires the absolute ownership of the premises levied upon, defeasible upon the performance of a condition subsequent, and he receives the rents and profits of such premises, during his occupation of them under the levy, as incident to such ownership, to his sole use, in the absence of any statute provision to the contrary.

A judgment creditor, who has levied his execution on land of his debtor, is not liable, in any form of action, to account for the rents and profits which he may have received during his occupation thereof, prior to its redemption by the debtor or his assignee.

June Term, 1856. *Merrimack.*

EATON *v.* BADGER.

Void judgments — Trustee process — Absent defendant.

Proceedings against trustees of debtors authorized by and dependent upon the provisions of a statute, must be strictly conformable thereto.

Where the principal defendant was not an inhabitant of this State, his property not attached on the writ, no personal service made upon him, and he did not appear and answer, and there was nothing in the hands of the trustees summoned in the suit, no judgment could lawfully be rendered against him, notwithstanding notice of the pendency of the suit had been given by publication comformably to an order of court.

Such judgment would be a mere nullity, and void, and might be impeached collaterally or otherwise; forming no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.

The levy of an execution issued upon such judgment, and all other proceedings under it, are void.

July Term, 1856. *Carroll.*

FABYAN *v.* UNION MUTUAL FIRE INSURANCE CO.

Double insurance — Risk increased — Act of incorporation.

It being provided in the act of incorporation of the defendant company, that the insurance made by said company upon any property shall become void by a double insurance subsisting thereon without the consent of the directors thereto indorsed on the back of the policy, the defendants may avail themselves of that provision to avoid a policy in case of such double insurance without the consent of the directors, notwithstanding there is printed on the back of the policy, under the caption, "Act of Incorporation of the Union Mutual Fire Insurance Company," two sections of said act, being the first and the last, and designated thereon respectively, as section 1 and section 20; the intermediate 18 sections of the act being omitted, and among those omitted, the section containing said provision; and there being also a reference in the sections printed to certain other provisions as contained in the act, which do not appear in the sections printed, but which are contained in those omitted.

The plaintiff having, after he had effected an insurance with the defendants, set up seven additional stores in the building in which the property insured was kept and used, notified the defendants

thereof, saying that he did not consider the risk "much increased" thereby, and requested them to inform him how much additional premium he must pay therefor. To this the defendants replied, that his policy had erroneously been taken in the wrong class, and that they declined to continue his insurance any longer, and would surrender his premium note without charge.

The plaintiff then wrote to the company, inquiring whether it would not be just to return the cash payment he had made for the insurance, as it was not good, and saying that if they would return that, he would be satisfied, and get insured in some other company. *Held*, that this was notice to the plaintiff, that the company declined to assume the increased risk, and elected to terminate the insurance under the provisions of an article of the by-laws of the company, that if the risk should be increased by any change of the circumstances disclosed in the application or by the alteration of any building, the policy thereon should be void, unless an additional premium and deposite should be settled with and paid to the company, and an assent thereto by the plaintiff, and that thereupon the policy became void.

Notes of Cases in Massachusetts.

Supreme Judicial Court of Massachusetts.

September Term, 1856. *Berkshire.*

Present: Dewey, Metcalf, Thomas, and Merrick, JJ.

Jones v. Sisson.

Pleading — Bill of exceptions — Mutual fire insurance company, assessments and by-laws of — Notice.

When a ground of defence is taken at the trial in the Court of Common Pleas, and, after the introduction of evidence by the plaintiff to the point, is sustained by the presiding judge, the plaintiff cannot, at the hearing in the Supreme Court on exceptions to the judge's ruling, object for the first time that this defence was not open under the defendant's answer, even though the writ and answer be referred to in the exceptions as part of the case.

The charter of a foreign mutual fire insurance company provided, that if any member should neglect to pay an assessment upon his deposit note, the directors might sue for and recover the whole amount of the note, with costs; and the money thus collected should remain in the treasury of the company, and the balance thereof, after contributing to the payment of losses and expenses, be repaid to the member, at the expiration of his policy. *Held*, that this was not a provision imposing a penalty; that a member, so neglecting to pay an assessment, was liable for the full amount of the note, in an action brought in this Commonwealth, setting forth the note, the laying of an assessment, notice thereof to the defendant, his failure to pay the same, and his consequent liability to pay the whole note; and, the note being made payable "to said company or their treasurer for the time being," that the action might be maintained in the name of the treasurer.

Giving personal notice of an assessment, laid by a mutual fire insurance company, upon a deposit note is a sufficient publication, within the meaning of a provision in the charter of the company, requiring assessments to be paid within thirty days after notice thereof shall have been published.

Evidence that notices of an assessment, laid by a mutual fire insurance company, addressed to each of the parties assessed, were made out either by the secretary or treasurer of the company, and that the secretary carried some of them to the post-office, and the treasurer carried some, and that one of the members, when afterwards called upon for his assessment, refused to pay, on other grounds than want of notice, are sufficient evidence of notice to that member, of the assessment, to be submitted to the jury.

The by-laws of a mutual fire insurance company authorized the director to borrow money to meet losses, and to include the sums thus borrowed, the interest thereon, and all necessary incidental expenses, in the next assessment. *Held*, that it was no objection to the validity of an assessment, that it included a reasonable amount for interest on money borrowed, and probable losses from failure of some of the assured to pay their assessments, and ten per cent. for collecting assessments.

J. D. Colt, for the plaintiff.

I. Sumner, for the defendant.

Agricultural Bank *v.* Bishop.

Principal and surety — Forbearance.

The receipt, at the maturity of a note, of interest on the unpaid balance for sixty days, with an understanding between the creditor and the principal debtor, without the knowledge of the surety, that the principal may pay the note at the expiration of that time, but unaccompanied by any agreement for extension of time, on which

the principal could have any remedy against the creditor, at law or equity, will not discharge the surety.

J. D. Colt, for the plaintiff.

G. J. Tucker, for the defendant.

Phelps *v.* Thomas.

Insolvent law — Discharge.

A verbal promise to pay a debt in full, is a "pecuniary consideration," within the meaning of Stat. 1848, c. 304, § 9, which declares any discharge in insolvency to be null and void, to which the assent of any creditor is procured by any pecuniary consideration.

M. Wilcox, for the plaintiff.

J. E. Field, for the defendant.

Warner *v.* Bacon.

Damages.

In an action for the breach of a contract to convey land, the plaintiff can recover only the damages sustained by him previously to the commencement of the action.

C. N. Emerson, for the plaintiff.

J. Price, for the defendant.

Ensign *v.* Briggs.

Partnership — Lands owned by — Attachment — Insolvent debtors.

Real estate, purchased with the partnership funds, and used for partnership purposes, and conveyed to all the partners, vests, at law, in the partners, as tenants in common; and a failure to dissolve an attachment of such estate, made in an action on a note given by the two partners, one as principal and the other as surety, after the dissolution of the partnership, will not render the partnership liable to proceedings in insolvency.

J. D. Colt, for the plaintiffs.

I. Sumner and *H. S. Briggs*, for the defendants.

Holmes *v.* Woodworth.

Equity jurisdiction.

One of two partners purchased the interest of his copartner in the partnership property, and agreed to apply the proceeds to the payment of the partnership debts, and to account for half the balance; and afterwards sold goods to the partnership, and took the note of the purchaser payable to himself, and then exchanged it for a note payable to a preëxisting creditor of the firm, and

delivered this last note to such creditor, in fraud of the insolvent laws. *Held*, that the assignee in insolvency of the partnership had no complete and adequate remedy at law, and might therefore maintain a bill in equity against such creditor to obtain possession of the note.

J. D. Colt, for the plaintiff.

J. E. Field, for the defendants.

Gibson *v.* Soper.

Avoiding of contract by insane person — Evidence of insanity.

It is not necessary to the maintenance of an action by an insane person or his guardian to recover land conveyed away by him while insane, that the consideration should first be restored to the grantee.

A decree of the Probate Court, dismissing a petition for the appointment of a guardian of an alleged insane person, on the ground that he was sane, and the verdict of a jury in favor of his sanity, upon the trial in this court of an appeal from such decree, are not conclusive evidence of his sanity, even at the dates of such decree and verdict, in an action brought by a guardian subsequently appointed, to recover land conveyed by him between those dates; and if admitted in evidence as a fact tending to prove his sanity, the defendant has no ground of exception.

I. Sumner and *R. A. Chapman*, for the plaintiff.

J. D. Colt and *C. N. Emerson*, for the defendant.

Palmer *v.* Ward.

Note, whether negotiable — Action.

A note for a sum certain, and for an additional sum uncertain and contingent, is not negotiable; and no action will lie upon it by an indorsee to recover any part of it.

J. Rockwell, for the plaintiff.

S. W. Bowerman, for the defendant.

Commonwealth *v.* Johns.

Indictment — Assignment of perjury.

One good assignment of perjury will support a general verdict of guilty, though the other assignments in the indictment be defective.

An averment, in an indictment for perjury, that upon the trial of a certain action, "it became and was a material question whether" a certain other fact was as stated, "whether" a third fact was as stated, is not fatally defective, by reason of the sign of the plural at the end of the word "question," and of any connecting "and," between the several questions stated.

J. Price, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

GOODRICH *v.* BODURTHA.

Amendment — Merger — Costs.

A judgment against the defendant, in an action on a note, was reversed by writ of error for want of jurisdiction over the defendant; the plaintiff then amended an action previously brought upon the judgment, by declaring upon the note. *Held*, that the action, so amended, could be maintained; and that the judgment, being void, was no merger of the note at the time of the commencement of the second action.

The rule of the Court of Common Pleas, passed in 1851, provided that no motion to amend, in matters of substance, shall be allowed after appearance of the adverse party, unless by consent, except upon payment of a term fee, does not apply to a case where an amendment of the declaration is rendered necessary by an answer *puis darrein continuance*.

J. D. Colt, for the plaintiff.

J. S. Page, for the defendant.

MANSIR *v.* CROSBY.

Replevin — Appraisement.

It is no ground for dismissing an action of replevin, that several articles of similar character, included in the writ, are appraised together at one sum.

H. L. Dawes and *J. Price*, for the plaintiff.

I. Sumner and *J. D. Colt*, for the defendant.

NARY *v.* POTTER.

Assumpsit — Act — Account annexed.

Money due on a special contract, which has been fully performed, may be recovered in *indebitatus assumpsit*, at common law, or in an action upon an account annexed, under the Practice Act of 1852, c. 312, § 2, cl. 7.

B. Palmer, for the plaintiff.

I. Sumner, for the defendant.

ROBINSON *v.* ENSIGN.

Sheriff, action against by deputy.

A deputy sheriff, for the taking of property from his possession by another deputy, may maintain an action against the sheriff.

H. L. Dawes, for the plaintiff.

J. C. Wolcott, for the defendant.

BALDWIN *v.* BALDWIN.

Divorce — Allowance to wife for counsel fees.

This court, in ordering a husband to supply his wife with means to prosecute or defend a libel for divorce, pursuant to St. 1855, c. 137, § 6, will allow the wife a reasonable amount for the compensation of counsel, under all the circumstances, without regard to the amount which might be properly charged, as between counsel and client, by the counsel actually employed.

J. Rockwell, for the libellant.

R. A. Chapman, for the respondent.

SMITH *v.* GIBBS.

Exemption from levy on execution of "tools, stock, fixtures," &c.

Under the statute of 1855, c. 264, by which § 22 of c. 97 of the Revised Statutes is "so amended as to exempt from levy on execution the tools and implements, materials, stock and fixtures of the debtor, necessary for carrying on his trade or business," the machinery and fixtures of a paper mill are not exempt.

R. A. Chapman and *N. L. Johnson*, for the plaintiff.

I. Sumner and *M. Wilcox*, for the defendant.

Hampshire, Franklin and Hampden Counties. September Term, 1856.

Present: SHAW, C. J., DEWEY, METCALF, THOMAS, and MERRICK, JJ.

HUBBARD *v.* HUBBARD.

Interrogatories to parties.

The provisions of the Practice Act, St. 1852, c. 312, §§ 61–74, allowing either party in a civil action to interrogate the adverse party in writing, are not repealed by St. 1856, c. 188, authorizing parties in civil actions to be admitted to testify in their own favor, and to be called as witnesses by the opposite party.

S. T. Spaulding, for the plaintiff.

W. Allen, Jr., for the defendant.

CHILSON *v.* ADAMS.

Measure of damages on bond of assignee in insolvency.

On a hearing in equity, after a default, in an action on the bond of an assignee of an insolvent debtor, for a neglect to pay to the creditors of the debtor a dividend ordered by the commissioner of insolvency, this court will not relieve the assignee from payment of any part of the dividend, on the ground that the sum divided

consisted in part of the purchase money received for lands of the debtor, sold by the assignee with full covenants of warranty, which purchase money, by reason of the failure of title to the lands, the assignee had become liable to refund to the purchaser.

S. T. Spaulding, for the plaintiff.

R. A. Chapman, for the defendant.

Billings *v.* Tucker.

Lease of stock to be returned.

In a lease for years of a farm and stock, including a yoke of oxen and sixteen cows, and a quantity of farming tools, the lessee covenanted to pay to the lessor one half of the products of the farm, and "six per cent. interest on one half of the amount that the said neat stock shall be appraised; and to faithfully return said stock and other personal property in quantity and quality to the said lessor or his legal representative, or the value of the same in money, as the said lessee may elect, said property, if retained, to be appraised by disinterested persons at the close of this contract." The lessee sold the oxen and two cows, and purchased other oxen and cows instead. *Held*, that the lessee had no right, before the expiration of the lease, to sell again the oxen and cows so purchased by him; and that, if he did, the lessor might maintain tort for the conversion of the cows against the purchaser.

S. T. Spaulding, for the plaintiff.

R. A. Chapman, for the defendant.

Commonwealth *v.* Dougherty.

Form of complaint for malicious mischief.

A complaint which charges the defendant with maliciously pulling up and destroying "thirty cabbages of P. F., and of the value of five dollars, situated or growing on land in the occupation of the said F.," is insufficient under St. 1846, c. 52, "concerning wilful and malicious injuries to personal property," because it does not show that the cabbages were personal property, and cannot be maintained under St. 1855, c. 457, unless it alleges a malicious entering of the garden where the cabbages were growing.

W. Griswold, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Graves *v.* Graves.

Construction of assignment of bond of defeasance.

A. having conveyed land to B. in fee, taking back a bond of defeasance of the same date for a reconveyance of the land upon payment of $1600 in three years and interest annually, trans-

ferred by assignment, indorsed upon the bond, to C., his executors, administrators, and assigns, "the within written bond or obligation, and the sum of sixteen hundred dollars mentioned in the condition thereof, together with all interest due and to grow due for the same, and all my right, title, interest, claim, and demand, whatsoever in and to the same, and all the right, title, and interest, which the said bond gives me in said sum of money, or the land to which it relates." *Held*, that this assignment transferred to C. B.'s equity of redemption in the land.

J. Wells, for the plaintiff.

W. Griswold, for the defendant.

Nelson *v.* Nelson.

Assignment of verbal contract for growing wood.

A. verbally sold to B. all the wood growing on certain land, with the right to cut it within a specified time, but without any express agreement that B. might assign his rights under this contract. B. cut a portion of the wood, and left it on the land, and sold it, with all his rights under the contract, to C.; and A. authorized C. to take off the remaining wood, but afterwards revoked this authority, and burned the wood. *Held*, that A. was liable to C. in an action of tort.

W. Griswold, for the plaintiff.

C. Allen, for the defendant.

Hays *v.* Drake.

Collector of taxes — Warrant to — Action against.

The Revised Statutes, c. 15, § 33, having provided that constables "shall also be collectors of taxes, unless other persons shall be specially chosen collectors," a constable duly chosen is protected by a warrant addressed to him as collector, if it is not shown that another collector was duly chosen and accepted; and his refusal to accept need not appear of record, although his election be recorded.

An action against a constable for seizing property on two tax warrants cannot be maintained, if one of the warrants is sufficient in form.

C. Allen, for the plaintiff.

W. Griswold and *S. T. Field*, for the defendant.

Commonwealth *v.* Cooley.

Officer — Arrest — Production of warrant.

An officer making an arrest by virtue of a warrant, and stating to the prisoner that he has a warrant, is bound to show the warrant

or state its contents to the prisoner at the earliest practicable moment after the arrest; but is not bound to do so before securing the prisoner, if he resists.

E. W. Bond, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

COMMONWEALTH *v.* ADAMS.

Consent of prosecutor to admission of defendant under St. 1855, *c.* 215.

Section 35 of St. 1855, c. 215, concerning the manufacture and sale of spirituous and intoxicating liquors, provides that "in all cases arising under this act, before a justice of the peace or police court, no admission of the defendant made in court shall be received on the trial, without the consent of the prosecutor, except a plea of guilty." *Held*, that such consent must appear of record; and that when a plea of *nolo contendere* was filed, without such consent being entered of record, a judgment thereon was erroneous, and the defendant on appealing to the court of common pleas, had the right to plead anew.

G. M. Stearns, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

INHABITANTS OF MONSON *v.* WILLIAMS.

Action against husband by town for support of wife.

A town, who support a wife neglected by her husband and standing in need of relief, may recover of her husband the amount expended by them necessary to support as a pauper, but no additional amount for supplies suitable to her condition in life.

W. G. Bates and *C. A. Winchester*, for the plaintiffs.

F. Chamberlin, for the defendant.

Worcester County. September Term, 1856.

Present: SHAW, C. J., DEWEY, METCALF, THOMAS, and MERRICK, JJ.

COMMONWEALTH *v.* WINGATE.

Evidence — Certificate of oath to complaint.

On the trial in the court of common pleas, of a criminal complaint on which the defendant had been convicted before a police court, the court allowed the complaint with the record of the police court thereon, to go to the jury, but instructed them that the record should not be considered as evidence in the case. *Held*, that the defendant had no ground of exception.

The certificate of the clerk of the police court of Worcester, that the complainant, in a criminal case, made oath to the com-

plaint before said court, is sufficient evidence that the complaint was duly sworn to, although it does not state whether it was before the standing justice, or one of the special justices.

C. E. Pratt, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Commonwealth *v.* Sullivan.

Indictment — Omission of "then and there."

An indictment for the abuse of "one Bridget Collins, a female child under the age of ten years, to wit, of the age of eight years," is not fatally defective, by reason of the omission of the words, "she then and there being," or other like words, after the name of the child.

W. F. Slocum, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Commonwealth *v.* Cummings.

Complaint — Description of place.

A complaint, which alleges that J. S., "of New Braintree in the county of Worcester," "at New Braintree," (without saying "said New Braintree," or adding the name of the county,) did sell intoxicating liquor, &c., sufficiently states the place where the offence was committed.

C. K. Wetherell, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Commonwealth *v.* Barnard.

Complaint — Description of place.

A complaint made to a justice of the peace for the county of Worcester, charging an unlawful sale of intoxicating liquor, "at West Brookfield," without saying "at the town of West Brookfield," or alleging it to be in the county of Worcester, is fatally defective.

P. C. Bacon, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

Amesbury *v.* Bowditch Mutual Fire Insurance Co.

Insurance company — By-law — Limitation of time and place of action.

A stipulation contained in a by-law of a mutual fire insurance company, which provides that in case of loss, the action on the policy, (in terms made subject to the by-laws of the company,) shall be brought within three months, at a particular court in the

county in which the place of business of the insurance company is established, is binding on the assured, so far as concerns the limitation of time, though void so far as it undertakes to affect the jurisdiction of courts.

P. C. Bacon and *D. Foster*, for the plaintiff.

R. Choate and *O. P. Lord*, for the defendants.

Turner *v.* Comer.

Contract to be signed by all creditors.

An agreement by which creditors agree to release their debtor, on payment of fifty per cent. of their several debts, but which expressly stipulates that it shall not be binding unless all the creditors become parties thereto, is ineffectual, if the claim of one creditor is paid in full, and he does not sign the agreement, although such payment be made within the time allowed for signing.

E. Washburn and *G. F. Hoar*, for the appellees.

C. Devens, Jr., and *G. F. Verry*, for the appellants.

Bradford *v.* Tinkham.

Practice Act — Answer — Must set up illegality of consideration.

Under the Practice Act of 1852, c. 312, §§ 14, 15, 18, illegality of consideration cannot be given in evidence in an action on a check, unless specified in the answer.

F. H. Dewey, for the plaintiff.

P. E. Aldrich, for the defendants.

Verry *v.* McClellan.

License to sell real estate.

A license granted by the judge of probate to sell "the whole of the real estate of the intestate," for the payment of his debts, does not follow a petition which describes a portion of the intestate's real estate, alleged to have been conveyed by the intestate with interest to defraud his creditors, and prays for leave to sell "the whole of *said* real estate;" and will not authorize an action by the administrator, under Revised Statutes, c. 71, § 11, to recover any portion of the estate.

P. C. Bacon and *G. F. Verry*, for the defendant.

G. F. Hoar, for the tenant.

[*To be continued.*]

Intelligence and Miscellany.

The Vigilance Committee in Court. — We see by the newspapers that members of the Vigilance Committee of San Francisco, who are visiting New York, have been held to bail in large sums at the suit of persons whom that body had banished from California. The trials will no doubt be ably conducted, and will certainly be very interesting.

In California, whether from the justice of their cause, or a dread of their power, political or personal, or for whatever other cause, the trial of one of the members, who, by order of the committee, forcibly took the arms of the State from the sloop in which they were being conveyed to Governor Johnson, resulted in a verdict of acquittal, to the satisfaction, apparently, of all concerned. The trial was for piracy, and took place in the United States Court, on the 18th September last. The District Attorney, in opening the case, is reported to have begun by saying that the jury must find a felonious intent or acquit the prisoners. And this seems to have given the cue to the whole proceeding. Judge McAllister in his charge, which was cheered by the bystanders, reviewed, certainly with much ability, the English authorities on the subject of robbery, and concluded that to constitute this offence there must be an *animus furandi*. His final summing up was as follows: —

I. If you believe, from the evidence, that the prisoner took the arms with the intent to appropriate them, or any portion thereof, to his own use, or permanently deprive the owner of the same, then, in the opinion of the court, he is *guilty*.

II. But if you believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing them being used on himself or his associates, then he is *not guilty*.

The jury, after an absence of five minutes, returned a verdict of not guilty. And we daresay this was the best way to settle the matter. We sincerely hope they may fare as well in New York, for if we have any doubts about the propriety of their course, it does not arise from sympathy with the present plaintiffs, or lead to a wish that the result should be lucrative to them.

Sentence of Arrison. — Arrison, whose case we noticed in the September Number, was at the end of that month brought up for sentence; and Judge Parker, before whom he had been tried, very properly took occasion to comment on the extraordinary verdict of manslaughter which the jury had rendered, and after an able review of the circumstances tending to show the deliberation and cruelty of the deed, condemned the prisoner to ten years hard labor in the penitentiary, the longest time awarded to the offence of which he had been convicted.

Rights of Foreigners in France. — We perceive, by a recent decision of the Imperial Court of Paris, that a debt contracted in his own country by a foreigner cannot be recovered against him in France, unless on a bill of exchange held by the creditor himself, or properly indorsed by him to another in the regular course of business, and before the bill becomes due. The following is the case to which we refer: —

"Mr. Lamie Murray, an English gentleman, obtained in London, in March, 1839, a loan of £1000 sterling from Dr. Elliotson, and gave him a bill for it. Subsequently Mr. Murray took up his residence in Paris, and he paid some portions of the amount, together with the interest on the

whole sum up to 1818, since which time he has paid nothing. On the 8th of June, 1855, a French gentleman, named Josseaume, notified to Mr. Murray that the bill had been formally transferred to him by Dr. Elliotson, and he obtained from one of the courts authorization to make a provisional seizure of Mr. Murray's furniture as security for the payment. Mr. Murray took proceedings to have the seizure set aside, and the tribunal, after hearing what he and Josseaume had to say, decided that as the debt owned by Murray had been contracted in England and to an Englishman, and as the bill in question had not been indorsed to Josseaume in the regular course of business, but transferred to him long after it had become due, he could not, according to French law, proceed against Mr. Murray before a French court, and that, consequently, the seizure of the furniture was void. M. Josseaume appealed to the Imperial Court against this decision, but it was confirmed." — [*N. Y. Herald.*]

The Poisoning Epidemic. — Since the trial of Palmer, of which we gave an account in our July number, there have been at least three trials in one circuit in England for alleged poisoning. William Dove was tried and convicted towards the end of July for killing his wife by strychnine. The case is chiefly remarkable when considered in connection with that of Palmer.

Dove heard of the murder of Cook, and that strychnine could not be detected, and he spoke of this to several persons; he bought the drug and gave it to his wife in several doses. Before her death attention was at once turned to the detection of strychnine, and it was readily discovered by chemists of no very extraordinary skill, the dose having been apparently a good deal too large, and the search for this particular poison having been begun immediately. The defence chiefly relied on was insanity, and proof was given of repeated acts of cruelty, stupidity, and folly, committed by the prisoner from his earliest years; it was an attempt to *prescribe* for the commission of crime, by showing it to have been his custom from the beginning to commit it. The jury found him guilty, with a recommendation to mercy, which, however, was disregarded by the government. His execution was attended by a vast crowd, many persons coming from a long distance by rail as they would to a fair or cattle show.

The other two trials which have come under our notice were both of them of wives for poisoning or attempting to poison their husbands. There is nothing of especial interest to note in them, excepting that the evidence showed a great carelessness on the part of apothecaries and their apprentices in the care and sale of poisonous drugs, and the learned judges hoped that Parliament would interpose some restrictions.

Libel. — A gentleman of Edinburgh being a candidate for a public office, one of the newspapers, opposed to him in politics, made some remarks on his public conduct upon a former occasion in a tone which we should regard in this country as highly mild and gentleman-like, *considering*. A jury, however, has rebuked the editor with a fine of £400. The press are very indignant, and declare that they are about to be destroyed, and that England will fall with them; some of the leading gentlemen of the party have also generously subscribed and helped the editor out with his fine.

For our part we don't see why the defeated candidates should not have some indemnity, and we recommend it to the serious consideration of disappointed politicians, of whom there will be a great many this fall, as every elective office is to be filled, and there are at least three candidates

for each, whether they could not find a good deal of consolation in the contemplation of a few fat verdicts. Of course it must be understood that only the defeated candidates shall sue, and that the winning party shall make a common purse for the editors. At all events the *outs*, whoever they may be, had better amuse themselves in this way than by resisting the powers that may be.

Notices of New Publications.

TOPICS OF JURISPRUDENCE CONNECTED WITH CONDITIONS OF FREEDOM AND BONDAGE. By JOHN C. HURD, Counsellor at Law. New York: D. Van Nostrand. 1856. pp. 113.

THIS pamphlet contains the first two chapters only of a work in which the author proposes to discuss the question of slavery in its legal bearings and in these alone. The pages now printed contain a statement of the principles or elements which lie at the foundation of the discussion, and they are well termed by the author abstract and elementary, the metaphysics of jurisprudence. We will not attempt to give a condensed statement of these principles; for this would require much space, as the author adopts a method and a terminology which are somewhat new to most readers here; but we will say that the topics appear to be reasoned with logical method and with an entire and quite remarkable familiarity with the works of the best writers on jurisprudence, whether English or foreign.

It is refreshing, certainly, in the midst of the heated controversy and fierce declamation of a presidential campaign, to see a treatise just from the press, which takes up the very topic of the day, from an altogether scientific and abstract point of view, as Achilles in his skin and armor of proof might a bomb shell, and coolly states to us in signs and figures its exact legal significance, with due order and measure of everything except its power.

We say this in all seriousness, and our readers who have any curiosity to get a good introduction to some of the best foreign writers, or who wish to study the principles of international or *quasi* international law, as applicable to the position and connection of the States and people in this confederacy, a subject of very great and constantly increasing importance, will thank us for calling attention to the book, which we hope the learned author will soon complete.

THE LAW OF CONTRACTS. By JOHN WILLIAM SMITH, Esq. Fourth American, from the second London edition by John George Malcom, Esq., with notes and references to both English and American decisions by William Henry Rawle, and with additional notes and references to recent American cases, by the Hon. George Sharwood. Philadelphia: T. & J. W. Johnson. 1856. pp. 498.

It would be idle for us to undertake at this day to introduce to our readers Smith on Contracts; our duty is ended when the title page has been copied. We may say, however, that although this book has had two American editors, and learned ones, yet they have been wise enough to confine the notes within reasonable bounds, contented with giving the most important references upon the most difficult and nice questions. The present edition will compare favorably with any of its predecessors.

MISCELLANIES, CRITICAL, IMAGINATIVE, AND JURIDICAL, CONTRIBUTED TO BLACKWOOD'S MAGAZINE. By SAMUEL WARREN, D. C. L., F. R. S. Edinburgh and London: Wm. Blackwood & Sons. 1855.

This volume constitutes the fifth in a collection of Mr. Warren's writings, just issued from the press of the Messrs. Blackwood, under the supervision of the author himself. Mr. Warren early in life became extensively known in Europe and in this country by those highly interesting fictions, "Ten Thousand a Year," and the "Diary of a Physician," and more recently by his "Law Studies" and the lectures on the "Duties of Attorneys and Solicitors." During the last twenty-five years he has been a frequent contributor to the pages of the periodicals, especially Blackwood, and this volume consists chiefly of a selection of such papers.

Mr. Warren has accomplished all this in the way of letters while engaged in an exacting and laborious profession, and has thereby added another to the many illustrious names whose record refutes the common impression of the incompatibility of legal and literary eminence. His writings all breathe a professional air, and burn with a genuine professional enthusiasm. Many of these papers relate to some of the most interesting incidents in the modern English bar, and recall some of the most brilliant ornaments of that forum; they indicate a warm enthusiasm for the professional character wherever exhibited.

The work contains many interesting papers, among which we may mention the author's prize poem at College, his first contribution to Blackwood, written when very young, and several good reviews and essays; but it was more particularly our desire to call attention to some of the papers of more exclusive professional concern. The article headed "My First Circuit," is an entertaining sketch of the scenes at sessions, and the life of an English lawyer upon circuit, the place where the most eminent of English barristers first tried their strength, and the field which in later life introduced them to fame and fortune in metropolitan practice, which has no parallel in this country.

Next follow two papers in the author's best style, and of high interest to all who reverence the great names of the bar. They are sketches of Sir William Follett and John William Smith, both martyrs to professional ambition and toil, one in the forum, the other in the more retired life of the juridical author; both names embalmed forever in the annals of the English bar. They were through life the intimate personal friends and companions of the author, and the work which first gave a name to Mr. Smith — The Leading Cases — was commenced from a suggestion in Warren's Law Studies. The career and character of this worthy man and eminent legal scholar, from the time when Warren first met him at the table of the Temple where they were students, to the hour of his death in his bachelor quarters, in the same inn, are given with a true affection and touching fidelity, which are the best comment upon the characters of both.

Mr. Smith is represented as of unprepossessing personal appearance and cold manners, but distinguished from his earliest years for precocious mental development, hard study, and ripe cultivation. On coming to the bar, he began as a special pleader, and for many years had to submit to the hardships and privations so often the lot of those who are without influential connection or the accident of family and birth to assist them. He came at last, however, to be overburdened with the best business at the bar, and fell a victim to excessive toil at the early age of thirty-six; the last case he and Sir William Follett ever appeared in was upon

opposite sides, on the argument before the House of Lords of the writ of error in O'Connell's case. They both died in a few months after, and within five months of each other. The best monument he could have left, remains in the Leading Cases, and the work on Mercantile Law.

The paper upon Sir William Follett is the most exquisite, heartfelt, and touching eulogium upon a great advocate we have ever read. Of all the great lawyers of England, perhaps no one of any age, certainly no one of modern times, occupies a higher place, or excites more professional esteem than Sir William Follett; doubtless, something of this comes from his more immediate connection with our times, — something from his untimely death, but all of it is justified by his great forensic character and his splendid professional career. He is said to have begun without fortune or friends; insomuch that Mr. Warren relates on the authority of Mr. Smith, that after he had been at the bar two years, Mr. Follett would gladly have accepted the post of police magistrate upon his circuit; but soon after this he began to rise, and in ten years from his admission, had acquired the best and most lucrative practice of any English barrister. Mr. Warren presents us here a graphic sketch of his daily life; and it is the life of the foremost man of the foremost bar of all the world; a life of glory but of exhausting toil, followed by broken health and premature death.

He must have been the best specimen of the genuine English lawyer the profession can boast; his advocacy was of the highest order; his tact and skill all but perfect, his legal learning profound, exact, and extensive, covering a mastery of the whole science of the law. He seems to have been equally at home in the civil, the criminal, and the equity courts. His urbanity, good temper, coolness and self-possession are proverbial, the kindliness of his heart and the gentleness of his nature, were known only to his intimate personal friends, among whom Mr. Warren was fortunate enough to be numbered.

He was not a man of letters, and in parliamentary life did not rank equally high as at the bar. Mr. Warren once asked John William Smith whether he thought Sir William Follett a great lawyer? "Certainly," said he, "if there *be* such a character as a great lawyer. What thing of importance that only a great lawyer could do, did not Follett do? He necessarily knew an immensity of law, and his tact was a thing quite wonderful, but it required much knowledge and experience to appreciate it. I was a great admirer of Follett."

There are several other papers of interest to the profession, containing amusing or interesting sketches of State trials or problems of circumstantial evidence, or otherwise legal or *quasi* legal in their character, which our readers will like to peruse.

S.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Atherton, Charles (*a*)	Dorchester,	Sept. 4, 1856.	Isaac Ames.
Bailey, John N.	Malden,	July 23,	L. J. Fletcher.
Bail, Eben W.	Salem,	Sept. 4,	Henry B. Fernald.
Bickford, Albert C.	Charlestown,	Aug. 11,	L. J. Fletcher.
Boston Steam Engine Co. (*b*)	Boston,	Sept. 26,	Isaac Ames.
Caldwell, Louis H.	Lynn,	" 24,	Henry B. Fernald.
Chaffee, Reuben H.	Wilbraham,	" 26,	John M. Stebbins.
Collins, George F.	Winchester,	" 8,	L. J Fletcher.
Crawford, William	Taunton,	July 10,	Joshua C. Stone.
Crehan, Patrick	Woburn,	Sept. 30,	L. J. Fletcher.
Dadmun, Sullivan	Marlboro',	Aug. 26,	L. J. Fletcher.
Dinsmoor, Charles M.	Needham,	Sept. 1,	Erastus Worthington, reg.
Draper, Milton M.	Attleboro',	July 29,	Joshua C. Stone.
Dunning, William S. (*c*)	Boston,	Sept. 10,	Isaac Ames.
Eaton, James	Malden,	" 1,	L. J. Fletcher.
Eaton, Sylvester	North Reading,	Aug. 29,	L. J. Fletcher.
Fish, Benjamin F.	Charlestown,	Sept. 4,	L. J. Fletcher.
Fisher, John S.	Malden,	July 22,	L. J. Fletcher.
Greenwood, Edward S.	Cambridge,	Sept. 1,	L. J. Fletcher.
Hartwell, Harrison J.	Groton,	" 10,	L. J. Fletcher.
Hathaway, Joseph	Boston,	" 19,	Isaac Ames.
Hoxie, Hiland H.	Boston,	" 18,	Isaac Ames.
Lothrop, Horatio G.	Charlestown,	" 27,	L. J. Fletcher.
Mann, James A.	Woburn,	" 10,	L. J. Fletcher.
Marsh, Elijah H. } (*d*) Marsh, Levi B. }	Montague,	" 10,	H. G. Newcomb.
McKay, Donald	Boston,	" 30,	Isaac Ames.
McKee, John	New Bedford,	Aug. 12,	Joshua C. Stone.
Mowry, William	Leyden,	Sept. 6,	H. G. Newcomb.
Nichols, William W.	North Reading,	" 11,	L. J. Fletcher.
Parshley, John W (*c*)	Boston,	" 10,	Isaac Ames.
Poole, Charles	Charlestown,	July 16,	L. J. Fletcher.
Pope, Thomas B.	Roxbury,	Sept. 20,	E. Worthington, register.
Prius, Arandes & Co. (*e*)	Lowell,	" 13,	L. J. Fletcher
Randall, Francis W.	Salem,	" 9,	Henry B. Fernald.
Reed, Robert G.	Roxbury,	" 23,	E. Worthington, register.
Rice, Aaron	Dana,	" 24,	Alexander H. Bullock.
Ridgway, John W.	Boston,	" 25,	Isaac Ames.
Sawyer, Edward J.	Georgetown,	" 25,	Henry B. Fernald.
Smith, Libbeus W.	Cambridge,	" 25,	L. J. Fletcher.
Streeter, Aurelius } (*f*) Streeter, Elias W. }	Holyoke,	" 23,	John M. Stebbins.
Thayer, Alfred S. (*g*)	Cambridge,	" 6,	Isaac Ames.
Thayer, George H. (*g*)	Boston,	" 6,	Isaac Ames.
Tufts, Otis	Boston,	" 26,	Isaac Ames.
Vickery, David, jr.	Lynn,	" 18,	Henry B. Fernald.
Walker, Seth C. (*a*)	Roxbury,	" 4,	Isaac Ames.
Weston, William M.	Woburn,	" 2,	L. J. Fletcher.
Whitney, Joseph	Templeton,	" 24,	Alexander H. Bullock.
Williams, Charles H. C.	Taunton,	July 21,	Joshua C. Stone.
Willson, William G.	Brighton,	Aug. 23,	L. J. Fletcher.
Worster, Edwin P.	Weymouth,	Sept. 22,	E. Worthington, register.
Zaingel, Nicholas J.	Boston,	" 3,	Isaac Ames.

(*a*) Atherton & Walker. Business in Boston.

(*b*) Boston Steam Engine Co. A Corporation.

(*c*) Dunning & Parshley.

(*d*) Late Copartners.

(*e*) Prius, Arandes & Co. Individual names not given.

(*f*) A. & E. W. Streeter.

(*g*) A. S. Thayer & Co. Business in Boston.